11.

FILED
MAR 1 1919
JAMES D. MAHER,
CLERK.

No. 171

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

RUST LAND & LUMBER COMPANY,
PETITIONER.

v.

ED JACKSON ET AL,
RESPONDENTS.

MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI.

GERALD FITZGERALD
GEORGE F. MAYNARD
MARCELLUS GREEN
GARNER W. GREEN
Attorneys for Respondents.

IN THE

Supreme Court of the United States

RUST LAND AND LUMBER COMPANY

Petitioner.

V.

ED JACKSON, ET AL

Respondents.

IN RE: PETITION FOR CERTIORARI.

Now come the respondents hereby by Attorney and move the Court to dismiss the petition for certiorari, because:

(1). Said petition was not filed until February, 19th, 1919, when final judgment sought to be reviewed was rendered in January, 1917, more than two years previous and the same is barred and prescribed.

(2). The judgment in the Supreme Court of Mississippi was against the Rust Land and Lumber Company and the surety on its appeal bond, the United Casualty & Surety Co., and the surety on a forthcoming bond, against whom judgment was rendered in the circuit court was the United States Fidelity & Guaranty Co, neither of which is brought before this court by this petition.

(3.) Petitioners, Rust Land and Lumber Company, have no title below high water mark, in Arkansas, under its settled law.

(4.) The bed of all streams in Arkansas is held by the State in trust, for the inhabitants; so that there could be no acquisition thereof by petitioner.

(5.) After an avulsion, no title arises through accretions in the bed of the river which dries up.

(6.) No Federal question decided, and if decided then in accordance with the law.

(7). AND FOR OTHER REASONS APPARENT.

Respectfully,

GERALD FITZGERALD,
GEORGE F. MAYNARD,
MARCELLUS GREEN,
GARNER W. GREEN.
For Respondents Named.

IN THE SUPREME COURT OF THE UNITED STATES.

RUST LAND AND LUMBER COMPANY
Petitioner.

V. No. 171.

ED JACKSON, et al.
Respondents.

TO THE HON. HERBERT POPE, CHICAGO, ILLINOIS:
Attorney for Petitioner,

Rust Land & Lumber Company:

PLEASE TAKE NOTICE that in answer to your motion, on March 3rd, 1919, these Respondents will make motion to dismiss said Petition for the reasons above shown.

Attorneys for Respondents in Error.

State of Mississippi,
County of Hinds
City of Jackson,

I, Garner W. Green, being first duly sworn, on oath states, that I am a member of the bar of the Supreme Court of the United States and that I have this day mailed by registered mail to Herbert Pope, Chicago, Illinois, attorney for said Plaintiff in Error in said above entitled cause, a true copy of this notice, together with a copy of the plea in bar to the petition for certiorari.

Subscribed and sworn to before me
this ------day of February, A. D. 1919.

Notary Public.

My Commission expires----------

12

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Supreme Court of the United States

OCTOBER TERM 1918.

RUST LAND AND LUMBER COMPANY,
Petitioner

v.

ED JACKSON ET AL.,
Respondents

PLEA IN BAR OF THE STATUTE OF LIMITATIONS TO THE PETITION FOR A WRIT OF CERTIORARI

GERALD FITZGERALD,
GEORGE F. MAYNARD,
MARCELLUS GREEN,
GARNER W. GREEN,
Attorneys for Respondents.

HEDERMAN BROS., JACKSON, MISS.

IN THE

Supreme Court of the United States

RUST LAND AND LUMBER COMPANY

Petitioner.

V.

ED JACKSON, ET AL

Respondents.

IN RE: PETITION FOR CERTIORARI. PLEA IN BAR

Now comes Ed Jackson, Will Scott, J. F. Nichols, A. C. Coleman, Zanders Parker, and Isom White, by their attorneys, and entering herein specially their appearance, for the purpose of filing this plea, say:—

That the final judgment in the above styled cause was rendered in the Circuit Court of Coahoma County, Mississippi upon --------day of December, 1913; and the final judgment affirming said judgment of the Circuit Court of Coahoma County, State of Mississippi, was rendered in the Supreme Court of the State of Mississippi upon the 8th day of January, 1917, as will more fully appear by the record herein, reference whereto is hereby made and the same prayed to be taken as part of this plea for the purposes of prescription, and that said petition filed herein by said Rust Land & Lumber Company, petitioner, against these respondents, was not presented to this court until the -------- day of February, 1919, more than two years after the entry of the final judgment by said Supreme Court and that these respondents now say that said writ of certiorari is barred and prescribed by the lapse of time under the statute in that behalf made and provided, and this they are ready to prove by the record aforesaid.

GERALD FITZGERALD,
GEORGE F. MAYNARD,
MARCELLUS GREEN,
GARNER W. GREEN.
Attorneys for Respondents Named.

STATE OF MISSISSIPPI
COUNTY OF HINDS
CITY OF JACKSON

Personally appeared before me the undersigned authority, the within named Garner W. Green, who being by me first duly sworn, on oath says, that he is one of the attorneys for the respondents in the above styled cause, and that the matters and things in the foregoing petition stated are true and correct as therein set forth, and that he is duly authorized to make this affidavit for and on behalf of said respondents, and that a copy of this plea was sent postpaid to the Hon. Herbert Pope, attorney for petitioner, Monadnock Block, Chicago, Illinois, upon the 22nd day of February, 1919.

Sworn to and subscribed before me this the

--------day of February, 1919.

DEC 14 1918
JAMES D. MAHER,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1918.

No. 171

RUST LAND & LUMBER COMPANY,
Plaintiff in Error,

vs.

ED. JACKSON *et al.*,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF MISSISSIPPI.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

HERBERT POPE,
Attorney for Plaintiff in Error.

ALBERT M. KALES,
Of Counsel.

GUNTHORP-WARREN PRINTING COMPANY CHICAGO.

Subject Index.

Brief and Argument.

List of Cases Cited.

IN THE

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OCTOBER TERM, A. D. 1918.

No. 171

RUST LAND & LUMBER COMPANY,
Plaintiff in Error,

vs.

ED. JACKSON *et al.*,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF MISSISSIPPI.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT.

This is a replevin suit brought in the Circuit Court of Coahoma County, Mississippi, by defendants in error to recover timber alleged to have been taken by plaintiff in error from their possession. There was a verdict and judgment for defendants in error in the Circuit Court (Rec., 164), and the judgment was affirmed by the Supreme Court of Mississippi without an opinion. (Rec., 171.) The judgment in the Circuit Court of Coahoma County was based, as plaintiff in error contends, upon a

single issue which involved necessarily the location of the boundary line between the States of Arkansas and Mississippi.

In 1848 the main navigable channel of the Mississippi River was changed by an avulsion which cut across the points of a horseshoe-shaped channel formed by the old course of the river and which left an island known as "Horseshoe Island" between the old and new channels. The plaintiff in error contends that the main navigable channel of the Mississippi River, before the avulsion of 1848, flowed through the channel which is still known as Old River or Horseshoe Lake, while defendants in error have attempted to show that the channel at that time corresponded with a smaller body of water farther north, known as Dustin Pond (Rec., 28-29), or that it was impossible to tell where the channel then was (Rec., 81), and have always claimed, and still do, in their briefs in this court, that the boundary line between the two states is a line equally distant from the two banks of the Mississippi River as they were located before the cut-off in 1848.

The issue raised at the trial can best be understood by reference to the map entitled: "Horseshoe Island and Accretions, Phillips County, Arkansas," appearing among the exhibits. (Rec., 287; the third map from the end of the exhibits.) The land in question lies between the horseshoe-shaped body of water marked "Dustin Pond" on the map and the larger horseshoe-shaped body of water marked "Old River" or "Horseshoe Lake," also called "Pecan Lake," and south and west of the section marked "22" on the map. (See map, Rec., 286.)

It is conceded on this record that title to Lots 1 to 9, inclusive, of Section 11, Township 28, Range 5, West, in the County of Coahoma and State of Mississippi (shown

at lower left-hand corner of map) is vested in certain persons from whom defendants in error claimed authority to cut the timber in question; that title to Section 22 and Section 23, Township 4 South, Range 4 East, Phillips County, Arkansas, is vested in plaintiff in error (Rec., 23), and, under the instructions to the jury, plaintiff in error is entitled to the accretions in Arkansas to such sections. (Rec., 161.)

It appears from the instructions given for defendants in error and plaintiff in error (Rec., 160-161) that the case was left to the jury upon the single issue of whether the land in question was in the State of Arkansas or the State of Mississippi. Defendants in error made no motion for a new trial and preserved no objections to any of the instructions given. It thus appears from the record that if the land in question is in Arkansas it belongs to plaintiff in error as accretions to Sections 22 and 23.

The following instructions in particular show that the case was left to the jury on the issue of whether the land in question was in the State of Arkansas or the State of Mississippi (Rec., 160-161):

> "The court instructs the jury that they can in no event find that the lands from which the timber in controversy was cut are accretions to the Arkansas shore unless the defendant has satisfied them by a preponderance of the evidence that the said land lies north and east of what was the thread of the stream or channel of the Mississippi River at the time of the cut-off in 1848, even though they believe from the evidence that the said tract of land is now connected with the Arkansas lands.
>
> The court instructs the jury that unless the Rust Land Company has shown to the satisfaction of the jury by a preponderance of the evidence, that the lands from which the timber in controversy was cut was a part of the accretions to the land belonging to the Rust Land Company in the State of Arkansas, or was north and east of a channel of the Mississippi

River where the cut-off 1848 occurred, then they will find for the plaintiffs.

The court instructs the jury for the defendant that if they believe from the evidence that the body of water shown on the maps introduced in evidence in this case, and called Old River or Pecan Lake is between the Mississippi shore and the land on which the timber in controversy in this suit was growing, and that this body of water was the last channel of the river as it dried up between the island and the shore of Mississippi, and that the said lands on which the said timber was growing, is not attached to the Mississippi shore or any accretions formed or attached thereto, then the jury will find for the defendant."

The instructions also directed the jury without qualification that the burden of proving that the land in question was in Arkansas was upon plaintiff in error. This appears from the first two instructions above quoted.

There was a judgment for defendants in error; a new trial was denied plaintiff in error, and an appeal was taken to the Supreme Court of Mississippi. (Rec., 164-166.)

On March 6, 1916, while this cause was pending on appeal in the Supreme Court of Mississippi, plaintiff in error filed a motion calling attention to the fact that there was then pending in this court an original suit between the State of Arkansas and the State of Mississippi to determine the location of the boundary line between the two states at the same point at which such boundary line is involved in this cause, and asking that this cause be continued until the determination by this court of the boundary line in question in the case between the states. (Rec., 178.) This motion was granted (Rec., 178), but subsequently defendants in error moved to set aside this order for a continuance upon the following grounds (Rec., 179):

"1. The decision of the Supreme Court of the United States will not be controlling in this case, as it may not be rendered, and will not be rendered, upon the same testimony produced in the same way, and the rights of the parties in this particular case are to be determined by the record as made and not by what may be developed at another time and under different circumstances.

2. There is no way known to the law by which said judgment in the Supreme Court of the United States can be in any way introduced into this court which is only a court of errors and appeals without any original jurisdiction, and its sole right in the premises is to affirm or reverse any decision made by the Circuit Court in accordance with whether or not said Circuit Court, upon the evidence before it, reached the correct conclusion.

3. Because this court is not in any way subject to the final jurisdiction of the Supreme Court of the United States, but on the contrary, as to the question herein involved, that is to say, the rights of the parties to the timber growing in what was formerly the Mississippi River, the Supreme Court of the United States follows the decisions of the states and does not overrule them."

This motion was granted; the order for a continuance was set aside and the cause set for hearing at the October term, 1916. (Rec., 180.) On December 23, 1916, the Supreme Court of Mississippi affirmed the judgment of the Circuit Court without an opinion. (Rec., 171.) A motion for rehearing was filed, and plaintiff in error also asked for an opinion, so that it might appear that a federal question was raised by reason of the fact that the case involved the determination of the boundary line between the two states. (Rec., 171-177.) Both motions were denied. (Rec., 179.)

A petition for writ of error was then presented to this court (Rec., 181-186), and this cause is now pending on writ of error issued on such petition. (Rec., 191-192.)

SPECIFICATIONS OF ERROR.

I.

The Supreme Court of Mississippi erred in finding that there was no error in the record in this cause in the Circuit Court of Coahoma County and in affirming the judgment of said Circuit Court in this: that the judgment of said Circuit Court involved a federal question—the location of the boundary line between the States of Arkansas and Mississippi—and such federal question was erroneously determined.

II.

The Supreme Court of Mississippi erred in finding that there was no error in the record in this cause in the Circuit Court of Coahoma County and in affirming the judgment of said Circuit Court in this: that the location of the boundary line between Arkansas and Mississippi was not determined by said court by ascertaining the middle of the main navigable channel of the Mississippi River prior to the avulsion in 1848, but was erroneously determined without reference to that fact.

III.

The Supreme Court of Mississippi erred in finding that there was no error in the record in this cause in the Circuit Court of Coahoma County and in affirming the judgment of said Circuit Court in this: that there was drawn in question in said Circuit Court the location of the boundary line between the State of Arkansas and the

State of Mississippi, and the judgment of said Circuit Court erroneously determined that said boundary line was so located that the land in controversy in this cause is situated in the State of Mississippi and not in the State of Arkansas.

IV.

The Supreme Court of Mississippi erred in granting the motion of the defendants in error to set aside the order theretofore entered to continue said cause, as requested by plaintiff in error, until this court decided the case of *State of Arkansas* v. *State of Mississippi,* then pending in this court, which case involves the determination by this court of the true boundary line between said states at the point at which said boundary line is drawn in question in this cause.

V.

The Supreme Court of Mississippi erred in granting the motion of defendants in error to set aside the order theretofore entered continuing said cause, and in refusing to continue said cause as requested by plaintiff in error until the decision by this court of the case of *State of Arkansas* v. *State of Mississippi* then pending in this court, in this: that the validity of an authority exercised under the United States was thereby drawn in question and the decision of said Supreme Court of Mississippi was against the validity of such authority.

VI.

The Supreme Court of Mississippi erred in finding that there was no error in the record in this cause in the Circuit Court of Coahoma County and in affirming the judgment of said Circuit Court in this: that said Circuit Court erred in instructing the jury as follows (Rec., 160):

> "The court instructs the jury that they can in no event find that the lands from which the timber in controversy was cut are accretions to the Arkansas shore unless the defendant has satisfied them by a preponderance of the evidence that the said land lies north and east of what was the thread of the stream or channel of the Mississippi River at the time of the cut-off in 1848, even though they believe from the evidence that the said tract of land is now connected with the Arkansas lands."
>
> "The court instructs the jury that unless the Rust Land Company has shown to the satisfaction of the jury, by a preponderance of the evidence, that the lands from which the timber in controversy was cut was a part of the accretions to the land belonging to the Rust Land Company in the State of Arkansas, or was north and east of a channel of the Mississippi River where the cut-off 1848 occurred, then they will find for the plaintiffs."

VII.

The Supreme Court of Mississippi erred in finding that there was no error in the record in this cause in the Circuit Court of Coahoma County and in affirming the judgment of said Circuit Court inasmuch as said Circuit Court erred in instructing the jury as follows (Rec., 160):

> "The court instructs the jury that should they find from the evidence that the plaintiffs cut the timber in controversy in good faith by authority of King and Anderson, Charles McGhee, Ellen Anderson, who bona fide claimed the lands as accretions

to sectional, T. 28, Range 5 West, in Coahoma County, Mississippi, and the defendant by force or intimidation took the timber away from them, then the plaintiffs have made out a *prima facie* case and it devolves upon the defendant to show, by a preponderance of the evidence that it is the owner of the land from which the timber was cut before defendant can recover in this case."

VIII.

The Supreme Court of Mississippi erred in finding that there was no error in the record in this cause in the Circuit Court of Coahoma County and in affirming the judgment of said Circuit Court in this: that said Circuit Court erred in refusing to instruct the jury, as requested by plaintiff in error, as follows (Rec., 162-163):

"The court instructs the jury to find for the defendant.

The court further instructs the jury for the defendant that in considering and determining the question as to whether or not the land from which the timber in controversy in this cause was cut the jury may consider and should consider, in connection with all of the facts and circumstances in this case, the following facts, if in proof, to wit:

1. The opinions of the surveyors and civil engineers who have surveyed and examined the lands in question, and who are competent, to give such opinions with reference to the nature of the formation of the said lands.

2. The fact, if in proof, that a body of water three hundred yards wide divides it from the shore of Mississippi, or the original bank of the Mississippi River on the Mississippi side as it existed at the time of the cut-off of 1848 as made by the river at Horseshoe Lake.

3. The fact, if the jury believe from the evidence that it is a fact, that this body of water is deeper on the Mississippi side than on the Arkansas side, that the deepest water extends from a short dis-

tance north of the old Mississippi shore about one-third of the way across the lake or Old River, and from there north the remaining two-thirds of the way continues to grow more shallow until it reaches, at a very shallow depth, the sloping northern bank with very little bank to show.

4. The fact, if in proof, that the timber on the accretions between the said Horseshoe Island and the land where the timber was cut grows perceptibly smaller the further from the island towards the south that it is examined and that the timber is of later growth if the jury believe from the evidence that it is, on the land from which the timber in controversy was cut then it is on the land further north and northeast in the direction of the island.

5. The fact, if in proof, that the lands from which the timber in controversy in this suit was cut, is attached to and part of the accretions coming down from the island to it, and is at no point attached to or connected with the Mississippi shore or any accretion thereto; all these facts and circumstances, if the jury believe them to be true from the evidence, together with all other facts and circumstances in this case, the jury may consider in determining the question now before them, as to whether the lands from which the timber in controversy was cut is as an accretion a part of the lands of the defendant, and if from these facts and circumstances, and all of the other facts and circumstances in proof in this case the jury believe that the lands from which the timber in controversy in this suit was cut is a part of the accretions to the lands of the defendant, then the jury will find for the defendant."

IX.

The Supreme Court of Mississippi erred in finding that there was no error in the record in this cause in the Circuit Court of Coahoma County and in affirming the judgment of said Circuit Court in this; that said Circuit Court erred in refusing to instruct the jury, as requested by plaintiff in error, as follows (Rec., 163):

> "The court further instructs the jury for the defendant that the plaintiffs in this case can in no event recover in this case for the timber in controversy unless the proof shows by a preponderance of the evidence that the timber was cut growing on the lands belonging to the grantors of these plaintiffs, or some of them, and even though the jury should believe from the evidence that there were two bodies of water between Horseshoe Island and the Mississippi shore which should be properly denominated Old River, that is to say, Dustin Pond and Pecan Lake, and that the land on which the timber was growing was between those two, still the plaintiff could not recover in this case unless the evidence affirmatively shows by a clear preponderance thereof, that the said land is an accretion to the Mississippi shore, belonging to the grantors of this plaintiff."

X.

The Supreme Court of Mississippi erred in failing and refusing to hold that the judgment of said Circuit Court of Coahoma County was contrary to the evidence in the record in this cause.

XI.

The Supreme Court of Mississippi erred in failing to reverse the judgment of the Circuit Court of Coahoma County on the ground that said Circuit Court erred in not directing a verdict for plaintiff in error, on the ground that, under the evidence in this cause, the land in question was situated in the State of Arkansas and not in the State of Mississippi.

XII.

The Supreme Court of Mississippi erred in denying the title, right, privilege or immunity specially set up and claimed by plaintiff in error under and in accordance with the true boundary line between the States of Arkansas and Mississippi as fixed and determined by the statutes and authority of the United States.

XIII.

The Supreme Court of Mississippi erred in affirming the judgment of the Circuit Court of Coahoma County.

BRIEF OF ARGUMENT.

I.

THIS COURT HAS JURISDICTION OF THIS CAUSE.

1. THE JUDGMENT OF THE SUPREME COURT OF MISSISSIPPI INVOLVED THE DETERMINATION OF A FEDERAL QUESTION—THE LOCATION OF THE BOUNDARY LINE BETWEEN THE STATES OF ARKANSAS AND MISSISSIPPI.

The Supreme Court of Mississippi affirmed the judgment of the Circuit Court without an opinion. (Rec., 171.)

(1) *The judgment of the Circuit Court was based upon a single issue which involved the boundary line between the states.*

All other questions were eliminated by the instructions to the jury. (Rec., 160-161.)

(2) *The judgment of the Supreme Court of Mississippi affirming the judgment of the Circuit Court could not have been based on any ground which did not involve the federal question of the boundary line.*

(a) The burden of proof related only to the issue involving the boundary line. (Rec., 160.)

(b) No question as to adverse possession was submitted to the jury or preserved on the record. (Rec., 160-161.)

(c) Similar instructions were not asked or given for both parties as to the boundary line or as to the burden of proof. (Rec., 160-161.)

(d) Under the instructions, if the land in controversy was in Arkansas it belonged to plaintiff in error and not to the state. (Rec., 161.)

2. A FEDERAL QUESTION WAS DIRECTLY RAISED IN THE SUPREME COURT OF MISSISSIPPI BY THE MOTIONS MADE BY BOTH PARTIES WITH REFERENCE TO THE CONTINUANCE OF THIS CAUSE PENDING THE DETERMINATION BY THIS COURT OF THE CASE BETWEEN THE TWO STATES.

The validity of an authority exercised under the United States was directly drawn in question and the decision was against its validity. (Rec., 178, 179, 180.)

Ireland v. *Woods*, 246 U. S., 323, 328.

The decision also denied a title, right, privilege or immunity under the statutes and authority of the United States as claimed by plaintiff in error.

See:

Cissna v. *Tennessee*, 246 U. S., 289, 293.
Kaukauna Co. v. *Green Bay Canal*, 142 U. S., 254.

3. THIS CAUSE IS REVIEWABLE BY THIS COURT ON WRIT OF ERROR.

(1) *There was drawn in question in this case the validity of an authority exercised under the United States, and the decision of the Supreme Court of Mississippi was against the validity of such authority, and this cause is therefore reviewable by this court on writ of error.*

The motion of defendants in error to set aside the order continuing the cause was expressly based upon the ground that the decision of this court in the pending case between the two states could have no effect upon the decision in this cause (Rec., 179), and thus directly drew in question the existence of an authority claimed to be exercised by this court, and the decision was against its existence or validity. (Rec., 180.)

Ireland v. *Woods, supra.*

The jurisdiction of this court is invoked upon this ground by the assignments of error. (Rec., 187-188.)

(2) *As the petition for writ of error in this case was filed in this court, this court is authorized, under Section 237 of the Judicial Code, to review this cause in any event.*

4. NONE OF THE SURETY COMPANIES MENTIONED IN THE RECORD IS A NECESSARY PARTY TO THE WRIT OF ERROR.

See brief for plaintiff in error on motion to dismiss (pp. 13-23).

(1) The United States Fidelity and Guaranty Company, surety on the replevin bond in the Circuit Court of Coahoma County, was not a party to the appeal to the Supreme Court of Mississippi, and the judgment of that court necessarily held that it was not a necessary party. It cannot, therefore, be a necessary party to the writ of error from this court to the Supreme Court of Mississippi.

(2) No judgment appears in the record against the United Casualty and Surety Company, the surety on the appeal bond in the Mississippi Supreme Court (Rec., 166), and the United States Casualty Company, mentioned in the judgment (Rec., 171), is not a party to the record in any capacity, and the judgment is a nullity as to it.

II.

THE LOCATION OF THE BOUNDARY LINE BETWEEN THE STATES OF ARKANSAS AND MISSISSIPPI,—A FEDERAL QUESTION—WAS NOT DETERMINED BY THE CIRCUIT COURT IN ACCORDANCE WITH THE RULES ESTABLISHED AND APPLIED BY THIS COURT IN SUCH CASES, AND THE SUPREME COURT OF MISSISSIPPI, THEREFORE, ERRED IN AFFIRMING THE JUDGMENT OF THE CIRCUIT COURT.

1. THAT THIS FEDERAL QUESTION WAS ERRONEOUSLY DECIDED BY THE MISSISSIPPI COURTS IS SETTLED BY THE DECISION OF THIS COURT IN CISSNA V. TENNESSEE, SUPRA.

2. THE CIRCUIT COURT OF COAHOMA COUNTY ERRED IN HOLDING THAT THE BURDEN OF PROOF IN THIS CASE WAS UPON PLAINTIFF IN ERROR TO PROVE THAT THE LAND IN CONTROVERSY WAS IN ARKANSAS AND NOT IN MISSISSIPPI.

The burden of proof related only to the issue of the boundary line and involved the federal question. (Rec., 160.)

3. THE SUPREME COURT OF MISSISSIPPI ERRED IN NOT REVERSING THE JUDGMENT OF THE CIRCUIT COURT, ON THE GROUND THAT A VERDICT SHOULD HAVE BEEN DIRECTED FOR PLAINTIFF IN ERROR.

If the rules established by this court in determining boundary lines are applied to the facts appearing in this record, it must be held that the Circuit Court erred in not directing a verdict for plaintiff in error. Any other decision would be an erroneous decision of this federal question.

III.

THE SUPREME COURT OF MISSISSIPPI ERRED IN SETTING ASIDE THE ORDER CONTINUING THIS CAUSE AND IN AFFIRMING THE JUDGMENT OF THE CIRCUIT COURT BEFORE THE DECISION OF THIS COURT IN THE PENDING CASE BETWEEN THE STATES OF ARKANSAS AND MISSISSIPPI.

Courts take judicial notice of location of boundary line as a fact by duly authorized body.

Bluefield Waterworks & Imp. Co. v. *Sanders,* 63 Fed., 333.

Decision of Mississippi Supreme Court was, therefore, erroneous.

After duly authorized tribunal has jurisdiction of cause to determine as a public or political fact boundary line between states or political subdivisions, the jurisdiction of other tribunals is superseded.

Supreme Court of Mississippi, therefore, erred in affirming judgment of Circuit Court while case between two states was pending and undetermined.

See Argument, *infra.*

ARGUMENT.

I.

THIS COURT HAS JURISDICTION OF THIS CAUSE.

We contend that federal questions are involved in this suit.

In the first place, the judgment of the Circuit Court of Coahoma County, which was affirmed by the Supreme Court of Mississippi, necessarily involves the question of the location of the boundary line between the States of Arkansas and Mississippi, and that question was not determined in accordance with the rules established and applied by this court in such cases.

In the second place, a federal question is involved in this cause, as we contend, because there was directly drawn in question in the Supreme Court of Mississippi, by motions made by plaintiff in error and defendants in error with reference to the continuance of this cause until the decision by this court of the pending case between the two states, the validity of an authority exercised by this court, and the decision of the Mississippi Supreme Court was against the validity of such authority.

For this second reason, also, we contend that this cause is reviewable by this court on writ of error, and we contend that it is so reviewable for the further reason that the petition for writ of error was presented to this court.

1. THE JUDGMENT OF THE SUPREME COURT OF MISSISSIPPI INVOLVED THE DETERMINATION OF A FEDERAL QUESTION—THE LOCATION OF THE BOUNDARY LINE BETWEEN THE STATES OF ARKANSAS AND MISSISSIPPI.

The Supreme Court of Mississippi affirmed the judgment of the Circuit Court, and the Circuit Court, by its instructions, submitted to the jury only one issue for its determination. That issue was whether the land in controversy in this cause was situated in the State of Mississippi or in the State of Arkansas, and necessarily, as the instructions show, involved the location of the boundary line between the two states. The judgment of the Supreme Court of Mississippi, therefore, as we contend, necessarily decided this federal question, and its judgment could not have been based on any other ground.

(1) *The judgment of the Circuit Court was based upon a single issue which involved the boundary line between the states.*

It may be that this cause could have been tried without reference to the ownership of the land on which the timber was cut. It is obvious, however, that defendants in error could not safely rely merely on the contention that the timber was taken from their possession by force and intimidation, because it appears that the timber was claimed by plaintiff in error while it still lay on the ground where it was cut; that the defendants in error gave it up at a meeting with plaintiff in error's agents in the State of Mississippi, and thereupon entered the employ of plaintiff in error for the purpose of removing the cut timber, and that this replevin suit was instituted a couple of weeks later after some of the timber had been floated in a raft to the Mississippi shore. (Rec., 46-47.)

Defendants in error, therefore, sought to prove title to the land where the timber was cut to be in their alleged licensors. (Rec., 17, 18, 26.) As the land in question is now separated from the land admittedly belonging to the licensors of defendants in error by Old River, which is about 900 feet wide, defendants in error made the claim that the channel of the Mississippi River was situated farther north and east in 1848 than Old River is to-day, in order to show that the land in controversy is within the State of Mississippi. (Rec., 36-37.) The claim also was made, and is still made in the briefs of defendants in error in this court, that the middle of the Mississippi River meant a line equally distant from the two banks. Thus, as a part of the case of defendants in error, the boundary line between the states became involved in this replevin suit.

When, finally, the case was submitted to the jury, all questions except the boundary question were eliminated. The instructions which the Circuit Court submitted to the jury made the case depend entirely upon the single question of whether the land was situated in Arkansas or Mississippi. The jury were in effect instructed, at the request of defendants in error, that plaintiff in error could recover only if the land in question was shown to be north and east of "a channel" or "the thread" of the channel of the Mississippi River before the avulsion of 1848. (Rec., 160.) It appears from the testimony with reference to the width of the river in 1848 (Rec., 37) and from the briefs for defendants in error in this court, that the contention of defendants in error is that the boundary line is not the thread of the navigable channel as it was before the avulsion in 1848, but a line equally distant from both banks.

The boundary line between the states was, therefore, not only actually involved in this cause, but, under the instructions of the court, it was necessarily involved, and was, in fact, made the sole issue in the case. It is now too late for defendants in error to contend that the case might have been tried on a different issue. The fact is that it was tried on the single issue which involved the location of the boundary line between the two states, and, under the instructions, this federal question was just as necessarily involved as it was in *Cissna* v. *Tennessee,* 246 U. S., 289.

Under the decision in *Cissna* v. *Tennessee,* it was not necessary that plaintiff in error should in terms call the attention of the trial court to the question of the boundary line as a federal question. In that case this court said (pp. 293-294):

> "The record does not show that Cissna specially set up in the state courts any contention that the decision of the merits turned upon questions of federal law, except as this may appear by inference from the nature of the grounds upon which the decision was rested. But if the Supreme Court of the state treated federal questions as necessarily involved and decided them adversely to plaintiff in error, and could not otherwise have reached the result that it did reach, it becomes immaterial to consider how they were raised."

It is true that in that case this court referred to the fact that the Supreme Court of Tennessee, in its opinion, considered the same question as to the boundary line that was considered by this court in *Arkansas* v. *Tennessee,* 246 U. S., 158. In this case that is impossible because the Supreme Court of Mississippi did not hand down any opinion. This, however, cannot change the fact that a federal question was necessarily involved in the

judgment of that court affirming the judgment of the Circuit Court of Coahoma County.

See, also:

Kaukauna Co. v. *Green Bay, etc., Canal,* 142 U. S., 254, 269.

(2) *The judgment of the Supreme Court of Mississippi affirming the judgment of the Circuit Court could not have been based on any ground which did not involve the federal question of the boundary line.*

(a) The Supreme Court of Mississippi could not affirm the judgment of the Circuit Court on the ground that the jury might have based its verdict on a finding that the defendant did not sustain the burden of proof, because the burden of proof which plaintiff in error was required to sustain related only to the location of the boundary line. (Rec., 160.)

(b) It is clear also, that the Supreme Court of Mississippi could not have affirmed the judgment of the Circuit Court on the ground that defendants in error acquired title by adverse possession. No issue based on this contention was submitted to the jury by the Circuit Court. In fact the Circuit Court refused an instruction asked by defendants in error on this ground (Rec., 162), and defendants in error did not move for a new trial or assign any cross errors, or make any motion to take the case from the jury, and, therefore, did not preserve any question whatever on this record which could have enabled the Supreme Court of Mississippi to affirm the judgment on the ground of adverse possession.

(c) Counsel for defendants in error make the further contention that the Supreme Court of Mississippi might have affirmed the judgment of the Circuit Court on the ground that plaintiff in error and defendants in error

asked and obtained similar instructions with reference to the determination of the boundary line question. (Supplemental Brief, 25.) This, however, is not the fact. The plaintiff in error never asked or obtained, as did defendants in error, any instruction to the effect that the boundary line between the states was "the thread of the stream or channel of the Mississippi River at the time of the cut-off in 1848," or "a channel of the Mississippi River where the cut-off in 1848 occurred." Such instructions were given for defendants in error, and, as already stated, the contention of defendants in error is that by thread of the channel was meant a line equally distant from both banks. They sought to show at the trial, not what was the middle of the navigable channel, but how wide the river must have been in 1848 in order to carry off the water. (Rec., 37.) They still contend in this court that the boundary line should be a line equally distant from the banks of the channel as it was before the cut-off in 1848.

On the other hand, the plaintiff in error sought to show at the trial that the deepest water in Old River was close to the Mississippi shore line (Rec., 78), and one of the instructions asked by plaintiff in error at the trial, which was refused, was that the jury, in determining the question presented as to the land from which the timber was cut, should consider the fact, if found to be a fact,

> "that this body of water (Old River or Horseshoe Lake) is deeper on the Mississippi side than on the Arkansas side, that the deepest water extends from a short distance north of the old Mississippi shore about one-third of the way across the lake or Old River, and from there north the remaining two-thirds of the way continues to grow more shallow until it reaches, at a very shallow depth, the sloping northern bank with very little bank to show."

In view of this there is no basis for the contention that

the Supreme Court of Mississippi could have affirmed the judgment of the Circuit Court on the ground that the cause was submitted to the jury on similar instructions asked by plaintiff in error and defendants in error. Certainly no such contention can be made with reference to the question of burden of proof. Under the instructions, the question of the boundary line was to be determined on the theory that the burden was upon plaintiff in error to prove that the land in question was in Arkansas and not Mississippi. There was no similarity in this respect in the instructions asked and given for both parties.

(d) The further contention made by defendants in error, that the Supreme Court of Mississippi might have affirmed the judgment of the Circuit Court on the ground that, even if the land in question were in Arkansas, plaintiff in error did not show title below high watermark, is also untenable. Under the instructions, the jury were directed to find for plaintiff in error if the land in question was found to be an accretion to the Arkansas shore and located in that state. (Rec., 160-161.) Defendants in error preserved no objection to these instructions in any way, and the Supreme Court of Mississippi could not, therefore, have affirmed the judgment of the Circuit Court on the ground that the lands were in Arkansas but did not belong to plaintiff in error. (See brief for plaintiff in error on motion to dismiss, 26-29.)

2. A FEDERAL QUESTION WAS DIRECTLY RAISED IN THE SUPREME COURT OF MISSISSIPPI BY THE MOTIONS MADE BY BOTH PARTIES WITH REFERENCE TO THE CONTINUANCE OF THIS CAUSE PENDING THE DETERMINATION BY THIS COURT OF THE CASE BETWEEN THE TWO STATES.

As already set forth in the statement of the case, plaintiff in error, by a motion, called the attention of the Mississippi Supreme Court to the fact that there was then

pending in this court a case between the State of Arkansas and the State of Mississippi which involved the determination by this court of the boundary line between the two states at the same point at which the boundary line is involved in this cause, and asked the court to continue this cause until the decision of that case by this court. (Rec., 178.) This motion was at first granted, but subsequently defendants in error made a motion asking the court to set aside the continuance theretofore granted, upon the ground that the decision of this court in the case between the two states *"will not be controlling in this case, as it may not be rendered, and will not be rendered, upon the same testimony produced in the same way, and the rights of the parties in this particular case are to be determined by the record as made and not by what may be developed at another time and under different circumstances."* (Rec., 179.) This motion was granted, the continuance was set aside and the cause placed on the docket (Rec., 180), and the judgment of the Circuit Court was subsequently affirmed without an opinion. It must be assumed that the motion of defendants in error was granted by the Supreme Court upon the grounds stated in that motion.

The motion thus made by defendants in error to set aside the continuance directly drew in question the authority of this court to render a decision in the pending case between the two states which should be controlling upon the parties in this cause and upon the Supreme Court of Mississippi. This question was directly raised, and the decision of the Supreme Court of Mississippi was against the existence of the authority claimed by plaintiff in error to be vested in this court. The jurisdiction of this court is invoked upon the express ground that there was drawn in question in the Mississippi Supreme Court the validity of an authority exercised under

the United States, and that the decision of that court was against the validity of such authority (Rec., 187-188), and also on the ground that the Supreme Court of Mississippi denied a title, right, privilege or immunity specially set up and claimed by plaintiff in error under and in accordance with the true boundary line between the two states as fixed and determined by the statutes and authority of the United States. (Rec., 188.)

In *Ireland* v. *Woods*, 246 U. S., 323, this court said (p. 328):

> "We said in *Champion Lumber Co.* v. *Fisher*, 227 U. S. 445, 451, that the validity of a statute of the United States or an authority exercised thereunder is drawn in question *when the existence or constitutionality or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry.*"

In the case at bar the existence of the authority of this court to determine conclusively by its decision in the case between the two states the location of the boundary line, so that that determination should be controlling on the Supreme Court of Mississippi and the parties in this cause, was directly drawn in question by the motions made by both parties in the Supreme Court of Mississippi, and the decision of that court necessarily involved a denial of the existence of such authority thus claimed by plaintiff in error. It is difficult to see how the question of the existence of an authority exercised under the United States could be more directly drawn in question than it was by the motion of plaintiff in error, and the subsequent motion of defendants in error to set aside the continuance theretofore granted, on the express ground that the decision by this court in the case pending between the two states would not be controlling and could have no effect upon the decision in this cause. It is clear, also, that the decision of the court denied a title,

right, privilege or immunity under the statutes and authority of the United States expressly claimed by plaintiff in error.

That the federal question thus drawn in question is a substantial one, and that it is an open one in this court, is shown by the opinion in *Cissna* v. *Tennessee, supra*, where a similar question was presented but not decided. (246 U. S., 289, 293.)

We submit, therefore, that a federal question was raised by the motions made in the Supreme Court of Mississippi, and by the decision of the Supreme Court setting aside the continuance theretofore granted and affirming the judgment of the Circuit Court without awaiting the determination by this court of the pending suit between the two states.

The Supreme Court of Mississippi undertook to determine a question regarding the effect and authority of a decision of this court in an original suit between states. It denied what was claimed to be the proper effect to be given to the adjudication by this court of the question of the location as a fact of the boundary between two states. It thus denied what was claimed to be an authority exercised under the United States.

We shall show hereafter that the Supreme Court of Mississippi erred in its conclusion that the decision of this court in the pending suit between the two states could have no effect upon its decision in this cause, and in affirming the judgment of the Circuit Court before the case between the two states was decided.

3. THIS CAUSE IS REVIEWABLE BY THIS COURT ON WRIT OF ERROR.

The supplemental brief for defendants in error (pp. 7-13) makes the contention that this cause is not reviewable by writ of error under Section 237 of the Judicial Code as amended in 1916. This contention is without merit for the reason already set forth, that there was directly drawn in question in the Supreme Court of Mississippi the validity of an authority exercised under the United States, and the decision of that court was against the validity of such authority. Furthermore, the petition for writ of error in this cause was filed in this court and not in the state court, and the writ of error was issued by this court upon such petition. Under such circumstances, we contend that this court is authorized under Section 237 of the Judicial Code, as amended, to review this cause, even if the petition should more properly have been in the form of a petition for certiorari.

(1) *There was drawn in question in this case the validity of an authority exercised under the United States, and the decision of the Supreme Court of Mississippi was against the validity of such authority, and this cause is therefore reviewable by this court on writ of error.*

Writs of error are expressly provided for by Section 237 of the Revised Statutes of 1916, "where is drawn in question the validity of a treaty or statute or an authority exercised under the United States, and the decision is against their validity."

The motion of plaintiff in error in the Supreme Court of Mississippi (Rec., 178) asking that court to continue this cause until the decision by this court of the case

then pending between the States of Arkansas and Mississippi, which was at first sustained by the Mississippi Supreme Court, and the subsequent motion by defendants in error (Rec., 179) to set aside the continuance theretofore granted, on the ground that the decision of this court in the pending case between the two states would not be controlling upon the Supreme Court of Mississippi in this cause, directly drew in question the validity of the authority of this court, in the case between the two states, to determine conclusively for all parties, including the parties in this cause, the location of the disputed boundary line between the two states. The order of the Supreme Court of Mississippi setting aside the continuance (Rec., 180) and the subsequent entry of the judgment affirming the judgment of the Circuit Court (Rec., 171) was necessarily a decision against the validity of the authority so claimed to be exercised by this court.

The ground of the motion for plaintiff in error asking the Supreme Court of Mississippi to continue said cause was stated as follows (Rec., 178):

> "The issue in controversy in this case is the boundary lines between the State of Arkansas and the State of Mississippi, the appellees claiming under a grant from the State of Mississippi and the appellant claiming under a grant from the State of Arkansas. So that, *the real question involved in this case, determinative of the rights of the parties, is the true boundary line between the said States at the place from which the timber involved in this suit was cut.*
>
> There is pending in the Supreme Court of the United States, and ready for the taking of testimony therein, said cause between the States of Arkansas and Mississippi, which involves only the true boundary line between said states at the very point in controversy in this suit, so that, *a determination of*

the boundary line by the Supreme Court of the United States, which has the final jurisdiction thereof, will determine the boundary line between said States, and whether the land involved is in the said State of Arkansas, as claimed by appellant, or in the State of Mississippi, as claimed by appellees is the basis of contention in this case.

Wherefore appellants move the Court to stay the trial of this action until the determination of said boundary at the very point in controversy in this case, until such determination by the Supreme Court of the United States has been made."

The motion of defendants in error to set aside the continuance, which was at first granted, was based expressly upon the ground that the determination by this court of the boundary line could have no effect upon the decision of this court. (Rec., 179.) There was thus directly drawn in question in the Supreme Court of Mississippi the validity of an authority exercised under the United States, and the decision of that court was against its validity. The statement of this court in *Ireland* v. *Woods, supra,* already quoted, "that the validity of a statute of the United States or an authority exercised thereunder is drawn in question *when the existence, or constitutionality, or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry," is* conclusive on this question. As already stated, it is difficult to see how the question of the existence of an authority exercised under the United States could be more directly drawn in question than it was through the motions of the parties and the decision of the Supreme Court of Mississippi in this cause.

It does not appear that in the case of *Cissna* v. *Tennessee, supra,* the jurisdiction of this court was invoked upon the ground that there was drawn in question in the

state court the validity of an authority exercised under the United States. In the case at bar the jurisdiction of this court is expressly invoked upon that ground by the assignments of error filed with the petition. (Rec., 187-188.)

We submit, therefore, that this case is properly reviewable by this court on writ of error.

(2) *As the petition for writ of error in this case was filed in this court, this court is authorized under Section 237 of the Judicial Code, to review this cause in any event.*

The general purpose of the 1916 amendment to Section 237 of the Judicial Code was to enlarge the jurisdiction of this court to review the decisions of state courts. The second paragraph of this section, as amended, which confers jurisdiction in certain causes by certiorari, begins as follows:

> "It shall be competent for the Supreme Court, *by certiorari or otherwise,* to require that there be certified to it for review and determination *with the same power and authority and with like effect as if brought up by writ of error,* etc."

We submit that it would be a singularly technical construction of this language of Section 237 for this court to hold that it was authorized "by certiorari or otherwise" to review a decision of a state court, with like effect as if brought up by writ of error, but that it was not authorized by this language, even on a petition for writ of error filed in this court, to review such a case at all. If this court should hold that the plaintiff in error was not entitled to the writ of error as a matter of right, we submit that this court should, under a statute permitting it to review cases by certiorari or otherwise, take jurisdiction in this case if the petition filed in this

court would have been allowed if in form a petition for certiorari. Considering the evident purpose of Congress in passing the amendment, and the language of the statute as above set forth, this court is certainly authorized to exercise its discretion, on the petition filed in this court, to review the decision of the state court in this case, even if plaintiff in error should be held not entitled to a writ of error as a matter of right.

4. NONE OF THE SURETY COMPANIES MENTIONED IN THE RECORD IS A NECESSARY PARTY TO THE WRIT OF ERROR.

On this point we refer to the brief for plaintiff in error on the motion to dismiss (pp. 13-23). We here merely summarize our contentions:

(1) The United States Fidelity and Guaranty Company, surety on the replevin bond in the Circuit Court of Coahoma County, was not a party to the appeal to the Supreme Court of Mississippi, and the judgment of that court necessarily held that it was not a necessary party. It cannot, therefore, be a necessary party to the writ of error from this court to the Supreme Court of Mississippi.

(2) No judgment appears in the record against the United Casualty and Surety Company, the surety on the appeal bond in the Mississippi Supreme Court (Rec., 166), and the United States Casualty Company, mentioned in the judgment (Rec., 171), is not a party to the record in any capacity, and the judgment is a nullity as to it.

II.

THE LOCATION OF THE BOUNDARY LINE BETWEEN THE STATES OF ARKANSAS AND MISSISSIPPI,—A FEDERAL QUESTION—WAS NOT DETERMINED BY THE CIRCUIT COURT IN ACCORDANCE WITH THE RULES ESTABLISHED AND APPLIED BY THIS COURT IN SUCH CASES, AND THE SUPREME COURT OF MISSISSIPPI, THEREFORE, ERRED IN AFFIRMING THE JUDGMENT OF THE CIRCUIT COURT.

1. THAT THIS FEDERAL QUESTION WAS ERRONEOUSLY DECIDED BY THE MISSISSIPPI COURTS IS SETTLED BY THE DECISION OF THIS COURT IN CISSNA V. TENNESSEE, SUPRA.

It is obvious, from the instructions to the jury (Rec., 160-161), that the Circuit Court of Coahoma County did not decide the federal question as to the boundary line in accordance with the rules established and applied by this court in such cases, and this is in fact conceded by the attorneys for defendants in error in their supplemental brief (p. 22). They admit that the question of the location of the thread of the navigable channel of the Mississippi River at the point in question, (the material question in such cases under the decisions of this court) when the Mississippi River formed a new main channel by the cut-off in 1848, was not considered or decided on this record. The instructions did not submit that question to the jury. Their contention now is that, even though this federal question, involving the location of the boundary line between the two states, was not considered and decided in accordance with the rules established and applied by this court, nevertheless plaintiff in error is not entitled to a reversal of the judgment, even though it involved an erroneous decision of a federal question, because it did not "seek to have the jury pass upon, as a settled fact, that which will be determined by

this court, when the case of *Arkansas* v. *Mississippi* is decided." (Supplemental Brief, p. 25.)

This contention, obviously, is in direct conflict with the decision of this court in *Cissna* v. *Tennessee, supra.* If the federal question was necessarily involved and decided, the judgment of the state court must be reversed unless that question was correctly decided. In other words, the defendants in error can sustain the judgment in their favor only in case the federal question was decided in accordance with the rules established by this court. Counsel for defendants in error do not contend that it was so decided, and, that being so, it is obvious that the judgment must be reversed by this court.

The instructions to the jury (Rec., 160-161) show that the federal question was not decided in accordance with the rules established by this court, although they necessarily required the jury to determine the question of the location of the boundary line. Shifting the burden of proof to the plaintiff in error did not eliminate the federal question, nor make it necessary that plaintiff in error should assume the responsibility of having the federal question correctly submitted and decided. The burden of proof related only to instructions which involved the location of the boundary line, and the instructions given on behalf of plaintiff in error required the jury to find in its favor if they believed from the evidence that the land in question was "not attached to the Mississippi shore or any accretions formed or attached thereto." (Rec., 161.)

It is clear, therefore, that the federal question as to the location of the boundary between the two states was not only involved and decided, but that it was incorrectly decided, and that the judgment must be reversed, in accordance with the decision of this court in *Cissna* v. *Tennessee, supra.*

2. THE CIRCUIT COURT OF COAHOMA COUNTY ERRED IN HOLDING THAT THE BURDEN OF PROOF IN THIS CASE WAS UPON PLAINTIFF IN ERROR TO PROVE THAT THE LAND IN CONTROVERSY WAS IN ARKANSAS AND NOT IN MISSISSIPPI.

In this case the question of the burden of proof related directly to the decision of the boundary line between the states, and, therefore, not only does not eliminate the question of the boundary line but is directly involved in the decision of that question. This court, therefore, is clearly entitled to review the decision of the Mississippi courts in placing the burden of proof as to the boundary line question on plaintiff in error.

Counsel for defendants in error concede (Suppl. Brief, 33) that there is evidence in this record, as pointed out in the brief for plaintiff in error on the motion to dismiss (p. 30), to show that the land in question was in the possesion of plaintiff in error and that no claims were made by others until the trespasses involved in this suit. (Rec., 49-53 and 121.) Moreover, it is conceded that the land in question now adjoins the land which admittedly belongs to plaintiff in error (Rec., 23), while it is separated from the land in Mississippi, on the ownership of which defendants in error base their claim, by a body of water about 900 feet in width. (Rec., 54.)

On the other hand, there is no evidence whatever on behalf of defendants in error of any continuous claim to the possession of the land in controversy, nor to any definite tract of land north of Old River. Nothing is shown in the way of payment of taxes. The only claim made proved finally to be that some of the parties under whom defendants in error claim at some indefinite time —about ten or twelve years before the trial—authorized

others to cut some timber on the land in controversy. (Rec., 31.) The indefinite character of the testimony of the chief witness on this point—Charles McGhee, an old colored man—can be fully realized only by reading it. (Rec., 26, 27, 31.)

Nor is there any evidence which warrants the conclusion that plaintiff in error took the timber from defendants in error by force or intimidation. The timber was still on the land on which it was cut when the agent of plaintiff in error appeared across Old River in Mississippi with a sheriff from Arkansas to demand it and warn defendants in error against future trespasses. The timber was never taken from the actual possession of defendants in error. They yielded it on demand, apparently without question, and thereupon entered the employ of plaintiff in error to rescue the timber from the rising water and remove it to a place designated by plaintiff in error. When the timber was moved into Mississippi this replevin suit was commenced. (Rec., 9-9, 12-15, 19-20, 22, 45-48.)

This evidence certainly did not justify the instructions given by the court in regard to the burden of proof. (Rec., 160.) These instructions not only required the plaintiff in error to prove by a preponderance of the evidence that the lands in controversy were in Arkansas, but required it to assume this burden under instructions which erroneously stated the law as to the location of the boundary line. Thus to throw the entire burden of proof in the case upon plaintiff in error, under instructions which made the issue depend upon an incorrect location of the boundary line between the two states, was clearly erroneous.

3. THE SUPREME COURT OF MISSISSIPPI ERRED IN NOT REVERSING THE JUDGMENT OF THE CIRCUIT COURT, ON THE GROUND THAT A VERDICT SHOULD HAVE BEEN DIRECTED FOR PLAINTIFF IN ERROR.

If the Circuit Court had applied the rule established by this court, in determining the boundary line question involved in this case, there can be no doubt that it must, on the record, have directed a verdict for plaintiff in error. That rule would have fixed the boundary line at the middle of the main navigable channel of the Mississippi River just prior to the avulsion in 1848. On the record in this case, that line must be held to be so located that the land in controversy in this cause is situated in Arkansas and not in Mississippi.

The maps shown as exhibits in the record locate the Arkansas shore in 1816 by a government survey. (Rec., 287; map of "Horseshoe Island and Accretions.") Another survey locates the Mississippi shore in 1833. This shore in 1833 shows a near approach to the present southern bank of Old River. (Map, Rec., 287.) The deepest water in Old River to-day is within about 300 feet of this shore. (Rec., 78.) As long as the channel of the Mississippi River followed the horseshoe-shaped course established prior to 1848, the current would necessarily follow the outside bank and would steadily wear away that bank. (Rec., 86.) The farthest point reached by this process would have occurred just prior to the avulsion of 1848. There has never been as much water in the old channel since that date, and the main navigable channel has followed a different course since then. The conclusion must be that the main navigable channel of the Mississippi River just prior to the avulsion of 1848 would have been near the outside bank of the channel, and that this bank, at the point in question, would have

been at least as far west and south as the present west and south bank of Old River. This would mean that the middle of the navigable channel on that date—the boundary line between the states—was close to the present west and south bank of Old River.

The testimony confirms this natural conclusion. The highest bank of Old River is the southern bank. (Rec., 40.) The north bank is low and gradually sloping. (Rec., 78.) The timber increases in size as you go north from the north bank of Old River. (Rec., 76.) There is a high cane ridge, as appears on the map (Rec., 287), which extends below Section 22 and south of Dustin Pond and indicates high ground longer out of water than the land to the south.

There is no testimony of any substantial character in the record inconsistent with these outstanding facts. The old colored man, Charles McGhee, on cross-examination spoke of water coming in in July, 1857 (Rec., 28), and this has been made the basis of a claim that the water in Old River came in at that time and prior thereto flowed through Dustin Pond. The supposition is contradicted by all the known facts. (Rec., 82.) There is no other testimony of any value to support this theory.

An attempt was made also to show how wide the river must have been to carry the water off. (Rec., 37.) But this was material only if the boundary line was a line equally distant from both banks, and had no bearing on the location of the middle of the main navigable channel.

We submit, therefore, that if the rules established by this court in determining boundary lines are applied to the facts appearing in this record, it must be held that the Circuit Court erred in not directing a verdict for plaintiff in error. Any other decision would be an erroneous decision of this federal question.

III.

THE SUPREME COURT OF MISSISSIPPI ERRED IN SETTING ASIDE THE ORDER CONTINUING THIS CAUSE AND IN AFFIRMING THE JUDGMENT OF THE CIRCUIT COURT BEFORE THE DECISION BY THIS COURT IN THE PENDING CASE BETWEEN THE STATES OF ARKANSAS AND MISSISSIPPI.

There can be no doubt that if this court had decided the case between the two states, and fixed the boundary line in question before the commencement of this suit, the trial court, in deciding this cause, must have taken judicial notice of the boundary line as thus fixed by this court. If the state court in such a case must accept and apply the rules of law established by this court, as was held in *Cissna* v. *Tennessee, supra,* it follows that it must notice and enforce a judgment of this court which fixes as a fact the location of the boundary line between two states. The jurisdiction of this court extends not only to the settlement of the rules of law which shall govern in such cases, but to the location of the boundary line as a question of fact, and its judgment determines that fact not only for the parties before it, the two sovereign states, but for all parties whose rights or interests are dependent upon the location of such boundary line. This is so because of the nature of the question determined—the political rights of sovereign states—and because this court is the only tribunal authorized to determine that question as a question of law and fact arising between sovereign states.

It is no doubt true that boundary questions between sovereign states are not usually left to the determination of regular courts exercising judicial powers only. In this country, however, the judicial power to determine controversies between the separate states has been

conferred by the states upon this court, and its judicial power with respect to the settlement of boundary controversies between the states is no longer open to question. The fact, however, that this court has jurisdiction of such controversies as a court does not mean that its power is confined to the determination of such questions for the parties before it—the two states—and that it is open to other parties to litigate the same question in controversies between themselves, regardless of the decision of this court in the case between the states. Although the procedure in a case in this court between two states is judicial, and the judgment that of a court, the question determined is in fact a question of public international rights arising between sovereign states. This court has held that the boundary question in such a case is not a political question in the sense that it cannot be settled by the judicial determination of this court (*U. S. v. Texas,* 143 U. S., 621, 641), but it is, nevertheless, a public question, and in that sense a political question, arising between sovereign states, and not merely a question of the proprietary interests of the states as corporate bodies.

That being so, it follows that other courts must take judicial notice of the location of a boundary line by the judgment of this court in a suit between two states, for the same reason that they take judicial notice of boundary lines between states or other political subdivisions when fixed and established by some other tribunal than a court. It is unnecessary to cite to this court the many cases in which judicial notice has been taken by courts of boundary lines thus determined. It is settled that the courts and all parties are bound to take notice of the location of such boundaries as a fact.

See, for instance, *Bluefield Waterworks & Imp. Co.* v. *Sanders,* 63 Fed., 333, where the court held that it was

bound to take notice of a boundary line between counties, subsequently made a boundary line between the States of Virginia and West Virginia, as located by commissioners duly appointed under a Virginia statute of 1845, and could not undertake to authorize the location of a better and straighter line.

Considering, therefore, the nature of the fact which is determined by this court in suits between the states for the purpose of fixing a disputed boundary line, it follows that it can make no difference that the Circuit Court of Coahoma County rendered its judgment in this cause before the case between the two states was commenced. For that reason it could not be called to the attention of the Circuit Court, as counsel for defendants in error suggest. (Suppl. Brief, pp. 22-23.) It must nevertheless be true that, if this court had decided the case between the states before the decision of this cause by the Mississippi Supreme Court, the Mississippi Supreme Court must have taken judicial notice of the location of the boundary line as determined by this court. Whenever that political fact is properly determined, all courts, appellate courts as well as trial courts, must take judicial notice of it.

The conclusion, therefore, of the Mississippi Supreme Court that the decision of this court in the pending case between the two states could have no controlling effect upon the decision in this cause was clearly erroneous, and the federal question as to the authority of this court that was drawn in question in the Mississippi Supreme Court was, therefore, erroneously decided. That was the only question, as the record shows, which was decided by the Mississippi Supreme Court with reference to this particular matter. The court was not asked to set aside the continuance theretofore granted except upon

the ground that the decision of this court in the case between the two states could have no effect upon the decision in this cause. (Rec., 179.) That this decision of the court was erroneous there can be no doubt.

But the decision of the Mississippi Supreme Court would have been erroneous even if based upon the ground that, while the decision by this court of the pending case between the two states would be controlling if already rendered, it was not required to await the decision of this court. This follows again from the nature of the question which this court is called upon to decide in the case between the two states. As already pointed out, that question, although subject to the determination of this court, involves the determination of a public fact. It is the determination of a political fact arising between sovereign states, and courts are required to take judicial notice of such facts, however they may be legally determined. When the properly authorized tribunal has assumed jurisdiction to determine that question, the jurisdiction of all other courts or tribunals to decide the same question is necessarily superseded. Can there be any doubt that if the states were authorized, under the Constitution, to select a special arbitration tribunal to determine disputed boundary questions, the appointment of such a tribunal by two states, and the submission to it of jurisdiction of a case to determine the boundary line as a fact, would supersede the power of all courts to determine that question in cases between private parties pending before them? Under the Constitution as it stands, this court has already been selected by the states as the tribunal to determine such disputed boundary questions. That being so, can there be any doubt that when this court has taken jurisdiction under the Constitution of a proceeding between two states to determine, as a public question, the location of a disputed boundary

line, the jurisdiction of all other courts to decide that same question is necessarily superseded?

Defendants in error in this cause not only could not claim, as a matter of right, that the Supreme Court of Mississippi should decide this cause without regard to the decision of this court in the case between the states, but the power of the court itself to proceed was superseded by the action of the State of Mississippi, under the Constitution, in submitting the question of the boundary line to this court for determination. Consent to that proceeding was already given, but the jurisdiction of this court to determine judicially that public question was invoked when the pending suit between the two states was commenced in the regular way.

Defendants in error are deprived of no vested right if they are now required to await the judgment of this court in the case between the two states, which their own sovereign State of Mississippi has already agreed shall be the only conclusive determination of the location of the boundary line. They must now seek to sustain their claim through the action of their own state, under the Constitution, in submitting to the jurisdiction of this court the authority to settle that question as a question of public international law.

The commencement of the suit between the states was a new fact with reference to the question involved in this cause. It meant that the boundary line between the two states—a federal question—was *then* located at the place at which this court should, in that suit, determine it to be. What this court determines is the location of the boundary line as it has always been since 1848 under the treaties and statutes of the United States. The authority, however, to determine that question is now vested exclusively in this court in the pending case be-

tween the two states. The Mississippi Supreme Court could proceed only on the assumption that it could now take judicial notice of the location of the boundary line as this court may finally fix it. That it cannot do, and has not attempted to do. Instead, it has disregarded the authority of this court, already invoked by the two sovereign states, to determine this question of public international law, and has in fact assumed authority to determine that question in this cause for itself.

We submit, therefore, that the Supreme Court of Mississippi erred in setting aside the order continuing this cause, and in affirming the judgment of the Circuit Court, while the case between the states was pending in this court and undetermined. It follows that the judgment of the Mississippi Supreme Court must be revised, but we respectfully submit that this cause should be retained by this court, and no order entered therein, until the case between the two states is finally disposed of by this court.

Respectfully submitted,

HERBERT POPE,
Attorney for Plaintiff in Error.

ALBERT M. KALES,
Of Counsel.

14.

Office Supreme Court, U. S.
FILED
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CLERK.

No. 171.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

RUST LAND AND LUMBER COMPANY,
Plaintiff in Error,

v.

ED JACKSON, ET AL,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF MISSISSIPPI.

BRIEF ON THE MERITS IN REPLY, FOR DEFENDANTS IN ERROR.

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INDEX TO HEADS.

ARGUMENT.—(Continued.)

POINT I. (c)

POINT I. (d)

POINT II. (b)

POINT III.

POINT IV.

TABLE OF CASES.

TABLE OF CASES—(Continued.)

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STATEMENT.

The Brief for Defendants in Error on the merits, having been filed prior to the receipt of the Brief for Plaintiff in Error, this reply is filed.

Opposing counsel is in error in claiming that there was only one question in this case, and that, a question of boundary between Arkansas and Mississippi. The questions in this case were many; one of which was, as held by the Circuit Court, that as Plaintiff in Error took, by force, from defendants in error the logs in controversy, the Plaintiff in Error could only recover by proving ownership of the land from which the timber was cut.

Defendants in Error, at law, could not appeal from a judgement in their own favor. There was but a single judgment—an entirety—and therefrom no appeal could be prosecuted by them.

The questions involved in the Supreme Court of Mississippi were far broader than a mere question of boundary. The Court was not limited, in its powers, to a mere consideration of matters, not vital or fundamental; but, irrespective of the instructions of the Court below, it was bound to render the judgment which was, in its opinion, right upon the law and the facts. We differ with counsel as to what was done upon the trial of this cause below, and, having been in it there, we are in better position to speak than is opposite counsel whose connection began with the filing of the Petition for the Writ of Error in this Court.

POINT I.

The judgment of the Supreme Court of Mississippi should be affirmed, if the motion to dismiss is denied, because,

(a) The affirmance of the judgment of the Circuit Court of Coahoma County, without an opinion, could not and did not decide any Federal question. It was a general affirmance of a judgement in replevin for the possession of logs, severed from the land, personalty, which had been taken by force and intimidation from Defendants in Error. Primarily, the right of Plantiff in Error to recover depended on the question of title; and this did not draw in question the validity of any treaty or law of the United States, of any State under the Federal Constitution. If any Federal question had been decided, it would have been the duty of the State Supreme Court to have written an opinion; for Section 4918, Code 1906, requires the Court to write opinions " in all cases settling important principles" **(Y. & M. V. R. R. Co. v. James,** 108 Miss., 852). This Court will not presume that the Supreme Court of Mississippi disregarded this statute.

No application for a writ of error herein was made to any judge of the Supreme Court of Mississippi. They alone knew what was decided and why.

(b) The boundary line between Arkansas and Mississippi is defined by the respective Constitutions, statutes and decisions of these States, and this, under express authority of the Acts of Congress.

(c) Even conceding the rule announced in **Iowa v. Illinois**, 147 U. S. 1, as a general principle, it has no application, for Arkansas and Mississippi have by their Constitutions, statutes and decisions fixed the practical location of the boundary line as the middle of the river, or thread of the stream.

(d) The Plaintiff in Error was held by the State Circuit Court to have the burden of proof, and it failed to make this proof, and, upon the trial, the jury found a verdict against it. This failure to prove its case could not involve a Federal question; but, it would be a proper ground for the Supreme Court to affirm the judgment without an opinion, as it would not settle any new or important principle.

(e) The evidence showed that the ownership of the land of Plaintiff in Error did not extend beyond high water mark on the Arkansas side, and the boundaries of the lands to which Plaintiff in Error had title could not involve a Federal question.

POINT II.

This cause is reviewable only by certiorari.

(a) There was not drawn in question the validity of any statute, treaty or authority exercised under the United States.

(b) The necessary parties were not brought before this court as parties to said writ of error.

(c) The plaintiff in error has in effect confessed that this writ of error would not lie by now making a motion in this Court for a certiorari.

POINT III.

The boundary between Arkansas and Mississippi was not determined by the State Supreme Court; but if so, such determination was in strict accordance with the law.

POINT IV.

The Supreme Court of Mississippi did not err in setting aside a continuance.

(a) Such action involved a construction of that Court's own rules requiring notice to be served.

(b) The erroneous decision of a State Court, as to a continuance if it existed, as it does not, would not be reviewed by this Court.

ARGUMENT

I-(a)

This Court will not reverse the judgment of the Supreme Court of Mississippi because the line between Mississippi and Arkansas is controlled by the respective Constitutions, statutes and decisions of the States, ratified expressly and impliedly by Congress.

The fundamental fact, is that the boundary line in question has been fixed by the respective States in their several Constitutions, and these Constitutions are to be construed by the Supreme Courts of these said States,

and their rights are governed thereby, and not by the interpretation placed by this Court upon the line between other States, and especially not between Arkansas and Tennessee, 246 U. S. 158; **Cissna v. Tennessee** 246 U. S. 289; **Arkansas v. Tennessee,** 247 U. S. 461.

In 1817, Mississippi came into the Union under said act of Congress, defining its boundaries, and thereafter, in 1836, Arkansas came into Union. The boundaries are delineated, so far as the United States was concerned, in the acts of admission, and the status fixed for Arkansas was in view of the previous fixed boundary status of Mississippi.

Since the admission of these States, in 1909, Congress passed an Act whereunder it was provided:

> "That the consent of the Congress of the United States is hereby given to the States of Mississippi and Arkansas to enter into such agreement or compact as they may deem desirable or necessary, not in conflict with the Constitution of the United States, or any law thereof, to fix the boundary line between said States, the Mississippi River now, or formerly, formed the said boundary line, and to cede respectively, each to the other such tracts or parcels of the territory of each state as may have become separated from the main body thereof by changes in the course or channel of the Mississippi River, and also to adjudge and settle the jurisdiction to be exercised by said States, respectively, over offenses arising out of the violation of the laws of said States upon the waters of the Mississippi River. Approved January 26, 1909."

This Act enjoys the unique distinction of having been quoted in full in Washington v. Oregon 214, U. S. 217, this Court then declaring: "We submit to the States of Washington and Oregon whether it will not be wise for

them to pursue the same course," to adjust their differences.

Defendants in Error contend that Arkansas and Mississippi, by their respective constitutions, have fixed the boundary line in question independently of any decision of this Court upon the principles applicable in Iowa v. Illinois, 147 U. S., 1, which boundary line so thus fixed by the Constitutions of said several States, has become conclusive under the authorization heretofore set forth from Congress. Washington v. Oregon 214, U. S. 217.

(a) The Western boundary of the State of Mississippi:

(1) The preamble of the Constitution of Mississippi, adopted August 15, 1817, declared (So far as material):

> "We, the representatives of the people inhabiting the western part of the Mississippi Territory, contained within the following limits, towit: Beginning on the River Mississippi, at the point where the southern boundary line of the State of Tennessee strikes the same; thence east along the said boundary line to the Tennessee River * * * * thence west along said degree of latitude to the Mississippi River; thence up the same to the beginning, assembled in convention * * *in pursuance of an Act of Congress, entitled: 'An Act, to enable the people of the western part of the Mississippi Territory to form a Constitution and State government; and for the admission of such State into the Union on an equal footing with the original States,' in order to secure to the citizens thereof the rights of life, liberty, and property; do ordain and establish the following constitution and form of government, and do mutally agree with each other to form ourselves into a free and independent State, by the name of the STATE OF MISSISSIPPI."

In Morgan v. Reading, 3 S. & M. (Miss., 1844) 366, uniformly approved since in Richardson v. Sims, 80 So. (Miss., Dec. 2, 1918) 4; Cook v. State, 81 Miss. 146 (applied but not cited); Boom Co. v. Dixon, 77 Miss., 593; Railroad Co. v. Frederic, 46 Miss., 9; Magnolia v. Marshal 39, Miss., 109; Com'rs v. Withers 29 Miss., 33), there was a controversy as to the boundaries of the State on the Mississippi River. The case was elaborately argued, and the opinion was by Chief Justice Sharkey. The question therein was: "Has the owner of the bank of the Mississippi River a right to recover for use and occupation, or riparian rent, for the use of the bank below high water mark, or is it subject to the unrestricted use of the persons navigating the Mississippi" (p. 396).

The Court declared that counsel for the plaintiffs in error "have addressed us a very ingenious argument, evincive of great research, in favor of the rights of their clients. In support of this position, we are referred to the laws of nature and of nations; the common law, the French and Spanish laws; and treaties and Acts of Congress."

The Court then set forth the treaty between Great Britain, France and Spain in 1763, wherein Great Britain was ceded all territory east of the Mississippi and north of the River Iberville, and the boundary fixed "by a line drawn along the middle of the River Mississippi from its source to the River Iberville," etc., and saying: (p. 397)

> "Great Britain continued to be the owner of this ceded territory until the 30th of November 1782, when, by provisional treaty, she acknowledged the independence of the United States, bounded on the west, above the 31st degree of north latitude, by a line drawn along the middle of the Mississippi River, corresponding exactly with the boundary in the treaty with France. This provisional treaty subsequently was incorporated into the definitive treaty of peace concluded on the 3rd of September, 1783." * * * *

This left Louisiana bounded on the east by the same line, the middle of the river, **Myers v. Perry**, 1 La. Ann. 372), above the River Iberville, as it had been established by the treaty of 1763; and by that boundary it was ceded by France to Spain and by Spain retroceded to France, and, ultimately by France, in 1803, to the United States; so that no variation in this line, up to that time had taken place."

The opinion then recites the establishment of the Mississippi territory in 1798, saying: "In 1798, whilst this was still the line between the United States and the province of Louisiana, Congress established the Mississippi Territory, bounding it on the west" by the Mississippi." Laws of U. S. V. 3, p. 39; and in 1817, Mississippi was admitted into the Union, with its boundary up the Mississippi River, from the 31st degree of north latitude to the Southern point of Tennessee on that river."

It further recites the division of Louisiana into two territories in 1804, and its admission into the Union in 1812 with her boundary running "down said river," and then declares that:

> "In defining the territorial and state boundaries, Congress adopted the more general mode of defining boundary on water courses, and omitted to designate the middle of the river as the limit, but, as we shall endeavor to show, did not thereby change the original boundary."

It then sets forth the adoption of the common law as a part of the jurisprudence of Mississippi and declares, (p. 399):

> "The Common Law, by construction, extends grants, bounded 'by', or 'on' or 'along', a fresh water stream, to the thread of the stream. The Mississippi Territory, by this rule, extended to the middle of

the river. All west of that line was owned by a foreign power, and we cannot suppose that Congress, under the circumstances, designed to limit the jurisdiction of the territory by the bank of the river. Having shown then that the Common Law was adopted for the government of the Mississippi Territory, and that the line of the territory was the middle of the river, it follows, that the rights of riparian owners on the east shore, must be determined by the Common Law. We thus dispose of the argument as invokes the rules of Civil Law."

And then again declared, page 403:

"It seems that the Common Law rule admits of no modification in consequence of the magnitude of a river. On the Ohio River, which is certainly one of the first magnitude, the Common Law prevails in regard to the rights of riparian proprietors. **Lessee of McCulloch v. Aten**, 2 Ohio Rep., 307; **Lessee of Blanchard v. Porter**, 11 Ohio Rep., 138. And in that State it has been adjudged that the ordinance of 1787, for the government of the North-Western Territory, which declares that the navigable waters leading into the Mississippi shall be common highways, and forever free, does not impair or abolish the Common Law principle, that he who owns the bank, owns to the middle of the river, subject to the easement of navigation. See 3 Kent's Com. (5th ed.) 427 and notes."

And then, after reviewing many decisions, declares (p. 406):

"The authorities cited establish the following conclusions: (1) That even the seashore, which is generally subject to public use below ordinary high water mark, is not subject to such use when it has become private property, such use being inconsistent with private right. (2) That there is a material

difference between rivers which are navigable, and those which are not navigable, according to Common Law meaning of the term. On rivers not navigable, the riparian proprietor, by construction of the Common Law, owns to the thread of the stream, unless restricted by the grant; and the bank being private property, subject to the exclusive appropriation of the owner, is not subject to the use of of the public, although the river itself be a public highway, the use of which may not be interrupted by the owner. (3) That as the bank cannot be used without the consent of the owner, * * *"

(2) By act of the legislature of Mississippi, approved March 1, 1854, the Judges of the High Court of Errors and Appeals were required to appoint three commissioners to revise, digest and codify the laws of Mississippi, and to propose such alterations or amendments thereto, and such new laws, as they may deem expedient.

The Judges appointed William L. Sharkey, Samuel L. Boyd, and Henry T. Ellett as such commissioners, and Mr. Boyd having resigned, Wm. L. Harris was subsequently appointed in his place. Introduction Revised Code of Mississippi, 1857.

The report of the commissioners was presented to the legislature in January, 1856, and after consideration of some few chapters, it was determined to postpone the residue until the first Monday of December, 1856, and to hold a special session of the legislature at that time for the purpose of acting on it.

This special session continued upwards of sixty days and resulted in the adoption of the laws contained in that volume.

> "The commissioners took the exisiting statutes as the basis of their action, and preserving the main body of the laws, only prepared such alterations and amendments, and such new laws as seemed to be demanded by the present circumstances of the State, and necessary to make the system harmonious and complete. The original drafts, reported by the commissioners, underwent the rigid scrutiny of the legislature and were freely amended and modified in many particulars." (Introduction Revised Code of Mississippi, 1857, III.)

Judge William L. Sharkey was Chief Justice of Mississippi from 1832 until after 1850, covering in his judicial career all of the Howard (Mississippi) reports, as well as fourteen volumes of the Smedes & Marshal Reports and held, in addition, many other public offices, and takes rank as, probably, the greatest jurist Mississippi has ever had.

Judge Henry T. Ellett was, also, a lawyer of distinction, and presided as a member of the Supreme Court for a number of years, his opinions being found from 39 to 41 Mississippi Reports.

Judge William L. Harris was, also, a judge of the Supreme Court, his opinions are to be found from 35 to 41 Mississippi Reports.

These judges held other and important public offices in Mississippi, and they were thoroughly familiar with its history, legislative, political and judicial.

The legislature at its session of 1856 adopted a historical report by Chief Justice Sharkey and Justices Har-

ris and Ellett and embodied it in the Code of 1857 (p.47) as follows:

> "It is desirable that the boundaries of the State should be defined with accuracy, and as some doubts have heretofore existed, arising from the use of general terms, particularly with regard to the precise line of the western boundary, it has been deemed necessary, by way of introduction to this chapter, to show from treaties and public acts, to what precise point the State is authorized to extend its jurisdiction, so that it may not seem to claim what does not properly belong to it. * * *
>
> "The Western boundary of this (Georgia) cession was only defined as being 'within the United States,' and the southern boundary of this cession was defined by reference to the dividing line between Spain and the United States. It becomes necessary, therefore, to ascertain the true western boundary, and also the southern boundary of the United States.
>
> "**First of the Western Boundary.**—By the treaty between Great Britain, France and Spain, concluded the 10th of February, 1763, the line between Louisiana, or the French possessions west of the Mississippi River, and the British possessions on the east, was fixed and defined by a line drawn along the middle of the River Mississippi, from its source to the River Ibberville. All west of this line was known as Louisiana. This boundary remained unchanged, and when, by the treaty of 1783, Great Britain acknowledged the independence of the United States, this same line, the middle of the Mississippi River, was designated as the western

boundary, and of course from that time until 1803, it was the dividing line between France and the United States, as it had previously been the line between Great Britian and France. In 1803, France ceded Louisiana to the United States by a general designation of the territory by name, which, of course embraced all that had previously been a part of Louisiana, including the **western half** of the Mississippi River. (Italics ours.)

"Before Louisiana had been acquired, towit: in 1798, Congress had established a territorial government over the Mississippi territory, without prejudice to the rights of Georgia, and although the middle of the Mississippi River was not expressly mentioned as the western boundary, but the more general expression, bounded on the west by the River Mississippi, was adopted; yet it must have been the intention of Congress to make the limits of this territory co-extensive with the jurisdiction of the United States on the west, otherwise **the east half of the river** would have been left subject to no jurisdiction. (Italics ours.)

"In 1804, Congress established the Orleans territory, embracing all that portion of country ceded by France to the United States, under the name of Louisiana, south of the Mississippi Territory, and of an east and west line to commence on the Mississppi river at the thirty-third degree of latitude, to extend west, etc. The middle of the river was not mentioned as the eastern boundary of this territory and yet it was made so by necessary consequence, by the use of the words, 'All that portion of country, ceded by France to the United States, under the name of Louisiana, etc.;' as by that cession Louisiana passed to the middle of the river.

"It was clear, therefore, that the **middle of the Mississippi River** was the dividing line

between the territories of Mississippi and Orleans. (Italics ours.)

"In 1812, Louisiana, which had constituted the territory of Orleans, was admitted into the Union; the eastern boundary being defined only as 'down the Mississippi river from the thirty-third degree of latitude, to the River Ibberville.' In view of what has been shown, the words used by Congress, to-wit: 'down said river (the Mississippi), to the river Ibberville, etc.' must be understood as meaning down the thread of the river, as the line had been before defined.

"By the Act of Congress of 1817, authorizing the people of Mississippi territory to form a State Constitution, it was declared that the boundary of the State should be as follows, to-wit: 'Beginning on the Mississippi River, at the point where the southern boundary line of the State of Tennessee strikes the same; * * * thence west, along the said degree of latitude, to the Mississippi River; thence up the same to the beginning.' And with this boundary Mississippi was admitted to the Union in the same year.

"Here too we must understand the general expression 'up the same (the Mississippi) to the beginning, as having reference to the **middle of the river**, or **thread of the stream**, as the line had been previously defined, and it follows that the State has a right, by Act of the Legislature to extend her jurisdiction that far, as this has undoubtedly been the precise boundary line between the territory lying east and west of the Mississippi river, ever since 1763." (Italics ours.)

It will thus be seen that the legislature at this time (1856) took jurisdiction over the **eastern half of the river**, and defined as its boundaries that which was midway between the fixed banks.

Then Article 1, Section II, Code 1857, p. 49, provides:

"The limits and boundaries of the State of Mississippi are defined as follows, to-wit: Beginning on the Mississippi river (meaning thereby the centre of said river or thread of the stream), where the southern boundary line of the State of Tennessee strikes the same, as run by B. A. Ludlow, D. W. Connelly, and W. Petrie, commissioners appointed for that purpose on the part of the State of Mississippi, in 1837, and J. D. Graham and Austin Miller, commissioners appointed for that purpose on the part of the State of Tennessee; thence east * * * * thence west along the said degree of latitude to the middle or thread of the stream of the Mississippi River; thence up the middle of the Mississippi River, or thread of the stream, to the place of beginning, including all islands lying east of the thread of the stream of said river."

Code 1857, p. 50, Art. 2, Section II, provides:

"The Counties lying immediately on the Mississippi River shall, respectively, have and possess jurisdiction and extend to the middle of the river, or western boundary of the State, within the space embraced by extending their boundary lines, which strike the river, on a continuous direct course to the extreme boundary of the State, including all islands that may be within the limits just defined;" etc.

We thus have an express legislative declaration, therefore, that ,so far as Mississippi was concerned, beginning in 1763, and continuing up to 1857, the boundary as between Mississippi and Arkansas had been fixed at the **middle of the river, or thread of the stream,** and from the enactment of the Code of 1857 to the present day an interesting further exemplification of our contention is shown.

(3). Shortly after the passage of the Code of 1857,

there arose the case of **Magnolia v. Marshall,** 39 Miss. (1860), 109, which was elaborately briefed, and decided by Mr. Justice Harris, who acted as a Commissioner in preparing the Code of 1857. The opinion there said:

> "The agreed state of facts in this record are almost identical with the case of **Morgan & Harrison v. Reading,** 3 S. & M., 366, decided in this court. What are the rights of the riparian owners, and what the **jus publicum** incident to the free navigation of the Mississippi, are questions there discussed, and are the important questions here again presented."

The opinion then declares (p. 116) that:

> "It has been the chief end and policy of civil society to assign to everything capable of ownership a legal and determinate owner; to secure common or public rights so far as the interest of the public require; to furnish a proper line of demarcation between these rights, common to all, and those private rights which belong to each individual as his exclusive property; and thus to promote the general peace and harmony of mankind;" and then quotes to approve; "That rivers not navigable.....do, of common right, belong to the owners of the soil adjacent.....that this ownership of the citizens, in both the soil and the use of the water of the rivers, is absolute; subject only to the right of way or public easement therein, where the same is capable of such use. That when the citizen derives his title to land bounded on a river, not navigable (that is, not on tide water), by grant from the State, such grant extends to the middle of the river——**'usque filum aquae'** ".*.*.

(p. 191) "And so as between nations, where an arm of the sea or a river is the boundary between them, if the original right of jurisdiction is in neith-

> er, and there is no agreement respecting it, each holds to the middle of the stream; while the public easement or right of **innocent use** still remains undisturbed thereby."

citing therefor the opinion by Mr. Justice Story, in the Schooner Fame, 3 Mason, 149, in which case Mr. Justice Story, with reference to this precise point said:

> "The general principle in relation to the rights of a nation to rivers and bays, of which it has an exclusive and prior occupancy, as laid down by **Vattel** and **Martens** in the passage cited at the bar, need not be disputed. Whether there has been, in point of fact, such exclusive occupancy, is often a matter of great difficulty to ascertain. The natural breadth, and extent of a river or bay, and the necessity of its constant use, in all parts, for purposes of trade and navigation, by the natives inhabiting the opposite banks must, in many cases, repel the supposition of an exclusive right. Where no exclusive right exists, the general principle of the law of nations, as deduced from the authorities, is, that each nation has a right to go to the middle of the stream, calculated from low water mark, as the limit of its territorial boundary. This doctrine has been affirmed by the Supreme Court in the case of **Hadley's Lessee v. Anthony**, 5 Wheaton, 374. But although the territorial line of a nation for purposes of absolute jurisdiction may not extend beyond the middle of the stream; yet, consistently with this doctrine, the right to the use of the whole river or bay for the purpose of navigation, trade, and passage may be given to both nations. Such a right does not destroy the territorial jurisdiction to the middle of the stream; but it is in the nature of an easement, as it is called at Common Law, or a servitude, as it is called in the civil law. It is like the

right of a highway, or private way, over the land of another. This right of passage and navigation must exist, as a common right, in all those cases, where such passage or navigation is ordinarily used by both nations, and is indispensable for their common convenience, and access to their own shores. A river or bay may be so narrow, or irregular, or so liable to difficulties from winds, waves, and currents, that it cannot be navigated by either nation without the necessity of the right of passing over the whole waters at all times. If, in such a case, no exclusive right is recognized in either nation, the constant use by both is conclusive proof of a common right of navigation and passage in both.

"These are all the principles which I think it necessary to bring into review on this occasion, so far as the case stands upon the general law of nations," and held that the fixed line was midway between the fixed banks of the bay.

And it is interesting to note that Judge Story was a member of the this Court at the time of the decision of **Hadley's Lessee v. Anthony,** 5 Wheat., 374, and which this distinguished Justice cites as sustaining that doctrine. The rule announced in the case of "The Schooner Fame" was followed by the Supreme Court of the State of Mississippi in 1860 as containing a correct definition of boundaries, and re-affirmed its decision, made in 1844, in 3 S. & M., supra.

The Supreme Court of Mississippi again says in the Magnolia case (p. 120):

"On the other hand, a doctrine wholly opposite to this, and founded upon reasons equally clear and satisfactory, was established in relation to fresh water streams, whether having **capacity** for naviga-

tion or not, which were **intra**-territorial, and over which the government had **exclusive right and dominion.**

"In relation to this class of rivers, the right of navigation was always wholly dependent on the **will** of the sovereign having the right of property in the soil; and by the laws of nations, such streams were **'not navigable'** for other nations, except by treaty or special permission of the local sovereign. Hence they are called **'not navigable,'** in **contradistinction** to such waters, etc., as were common to all **nations.**

"In the construction of grants of land made to the citizen and bounded on these fresh water streams, over which the sovereign had exclusive title and jurisdiction, there could be no question of the **right** of the sovereign to part with the title of the soil to the grantee. It became therefore a mere question of intention. The Courts of common law applying to these deeds or grants the ordinary rule of construction, in cases of doubt, construed the grant most strongly in favor of the grantee; and upon the further presumption that the grantor, in parting with his land on both sides of a water course whether capable of navigation or not, could scarcely have intended, without express clause to that effect, to reserve the water-course to himself have held with unvarying uniformity in England, from the earliest period down to the day that such grants, bounded **on**, or **by**, or **at**, such water-course, conveyed to the respective riparian grantees the right of soil and the use of water (subject to the **jus publicum) ces que ad filum aquae.**"

The Court said in said case (p. 130):

"A much shorter, and, to my mind, more satisfactory mode of reasoning, reaching the same conclusion, may be deduced from a few well-settled

principles of the common law of almost universal application.

"All grants and contracts are to be construed as having reference to the laws and policy of the State or country where the contract is made, or the property which forms its subject is situate.

"At the time the title to the lands in question on the banks of the Mississippi River were granted by the government of the United States, the common law prevailed in the State of Mississippi. Indeed, the common law had probably prevailed over this territory as a part of the British grant to Oglethorpe of the colony of Georgia, long anterior to the deed of cession by Georgia to the United States; see **Morgan et al v. Reading,** 3 S. & M., 366. The purchasers of these lands bounded on, or by, or at, the Mississippi River, therefore, took such right, title, and boundary as the language and construction of these grants imported by the rules of the common law.

"We have already seen that there is not a case to be found, either English or American, which doubts or disputes that by the common law of England the right of the riparian owner, on the banks of fresh water streams, extends to the middle of the stream, subject always to the public right of free navigation."

And then,at page 135, the Court declared:

"The whole legislation of Mississippi in relation to her western boundary is founded upon the rule of the common law, and her jurisdiction and right of soil to the middle of the river has been again and again asserted and acted on without dispute or denial. See Rev. Code, (1857) pp. 47-49 and 67, Art. 101."

Thus, we have an express declaration by the judiciary, adopting as correct the declaration of the legisla-

ture that the eastern half of the Mississippi River was a part of Mississippi and the east half of the Mississippi River does not mean a third or fourth, or anything else than one half of the river between bank and bank.

That this is correct is demonstrated by the decision in Arkansas of **Cessill v. State,** 40 Ark., page 505, where the doctrine of our cases is made the foundation of a similiar construction of Arkansas' Constitution.

(5) Next comes the Constitution of Mississippi of 1869, adopted in Convention, May 1868, ratified by the people upon the 1st day of December, 1869. Miss. Code, 1871, p. 656, Code 1880, p. 19.

By Article 2 of that Constitution, it is declared:

> "The limits and boundaries of the State of Mississippi shall remain as now established by law."

At the date of the adoption of this Constitution, "the limits and boundaries," as embodied in the Code of 1857 had acquired a fixed, definite, judicial interpretation by the decisions of **Morgan v. Reading,** 3 S. & M., 1844, **supra,** and by the Magnolia case in 1860; and when the Constitution was adopted that decision became integrated into it as the legislative declaration contained in the Code of 1857.

Under the settled rule in Mississippi, when a judicial decision has construed a statute, and that statute is subsequently enacted, the judicial decision construing it is integrated into the new adoption.**Shotwell v. Covington,** 69 Miss., 735; **Weatherby v. Roots,** 72 Miss., 355; **Hay v. Hay,** 93 Miss., 732; **White v. R. R. Co.,** 55 South., 593.

The State of Mississippi adopted as a part of its Constitution this declaration above quoted, under which

the State took jurisdiction over the eastern half of the Mississippi River extending to the middle of said river, as defined by Mr. Justice Story in the case of "The Fame," and following the decision of that learned justice, it has embodied in the Constitutions of Mississippi, beginning with 1868, and extending to the present date, exactly the same declaration.

(6). The Constitution of Mississippi of 1890, however, does not provide that "the limits and boundaries .....shall remain as now established by law" as did the Constitution of 1869, but makes express declaration (Mississippi Code 1906, Art. 2, Sec. 3) thus:

> "The limits and boundaries of the State of Mississippi are as follows, to-wit: Beginning on the Mississippi River (meaning thereby the center of said river or thread of the stream) where the southern boundary line of the State of Tennessee strikes the same, as run by.....commissioners appointed for that purpose on the part of the State of Mississippi A. D. 1837, and..... commissioners appointed for that purpose on the part of the State of Tennessee, thence east..... thence west along said degree of latitude to the middle or thread of the stream of the Mississippi River, thence up the middle of the Mississippi River, or thread of the stream, to the place of beginning, including all islands lying east of the thread of the stream of said river, and, also, including all lands which were at any time heretofore a part of the State.

Thus, expressly, adopting the verbiage found in the Code of 1857, and this has continued to be the law ever since as a part of the Constitution of Mississippi, and was so interpreted in:

(7). **State v. Cook**, 81 Miss., 150.

(8). Miss. Code of 1871, Section 18, contains a

change in verbiage of the Code of 1857, but defining the territory as "comprising therein to the middle thread of the stream, in all river boundaries" and thereby expresses the same idea.

(9). In the Code of 1880, Secs. 21 and 23 is an adoption of almost the identical verbiage of the Code of 1857, supra.

(10.) Again: There was a re-adoption of almost the identical verbiage of the Code of 1857 in the Code of 1892, Sections 345, 347.

(11). The Code of 1906, Sections 403 and 405, also is a readoption of the Code of 1857.

The Constitution of Mississippi, of 1890, Section 3, supra, as, also, the Constitution of Arkansas, Section ——, declare, that "all lands which were at any time heretofore a part of the State" shall continue to be a portion of the State.

(12). Riparian rights in Mississippi, were reviewed in **Archer v. Greenville**, 233, U. S., 60 where this Court said:

> "Is the plaintiff the owner of the sand and gravel in the bed of the rivers.
>
> "The law of Mississippi is an element in the case. It first found elaborate discussion and decision in **Morgan v. Reading**, 3 Smedes & M., 366, and it was held that the common law was adopted for the government of the Mississippi Territory, and that the line of the territory was the middle of the Mississippi River, and that it hence followed that the rights of riparian owners on the east shore must be determined in the State of Mississippi by the common law, and that it was a principle of that law 'that he who owns the bank,

owns to the middle of the river, subject to the easement of navigation' 3 Kent, Com. 5th ed., 427, and notes were cited.

"The case involved the right of the owner of the bank of the river to charge for mooring purposes on the river above low water mark. The right was sustained upon the principle which we have stated above.

"The same principle was announced in **Magnolia v. Marshall** 39 Miss., 109. The case was said by the court to be indentical in its facts with **Morgan v. Reading.** The opinion is too long to review, or to quote from at any length. It left no case or authority unreviewed, nor any consideration untouched, and carefully distinguished the public and private interest in the Mississippi, the Court saying: 'There is therefore, no inconsistency, but, on the contrary, as before suggested, perfect harmony between the **jus privatum** of riparian ownership in public fresh-water streams, to the middle of the river, and the **jus publicum** of free navigation thereof. The **soil** is granted to the riparian proprietor, subject to this public easement. And, again, in criticism of what the Court considered an untenable view expressed by the court in another state, it said: 'This general doctrine is as old as the Year-books, that **prima facie,** every proprietor on each bank of a river is entitled to the **land** covered with water to the middle of the stream.' This being declared to be the law of the state, judgment was entered for charges for the use by the Magnolia of a landing on the river.

"But it is said by the Gravel Company that according to the agreed facts 'there was no use or occupation' of the lands of the plaintiff in the case' beyond high water mark; the only portion used and occupied being the bank of the river between high and low water mark;' and that the

court, identifying the facts with those in the Morgan Case, said: 'What are the rights of the riparian owners, and what the **jus publicum** incident to the free navigation of the Mississippi, are questions there presented, and are the main questions here again presented.' This statement, it is hence contended, limits the binding authority of the opinions 'as judicial determination to a decision of what are the rights of a riparian owner between high and low water marks as connected with the rights of the public in using the Mississippi River as a public highway and navigable stream'. And it is further contended that the 'question is in no way connected with the ownership of the bed of the stream, or ownership of the gravel and sand in the channel of the stream.' It is therefore insisted that 'the case called for nothing more than a decision as to these bank rights, and if more was intended by the judge who delivered the opinion, it was purely **obiter.**'

"We cannot concur in this view. The Court deduced the right to charge for the occupation of the water between high and low water mark, from the ownership of the soil to the middle of the thread of the stream. The elaborate reasoning and research of the opinion were directed to demonstrate that under the common law of the state, riparian ownership extends **ad filum,** and, as a consequence, embraces the right to charge for the use of the water between high and low water marks for landing purposes, although not for the purposes of transit. The case is cited as having that purport in 3 Kent. Com. 14th ed. 427, where the doctrine of riparian rights as they obtain in the states of the Union is considered and cases collected. In the sixth edition of Kent, the Magnolia case is commended as 'a frank and manly support of the binding force of the common law, on which American jurisprudence essentially rests.'

See, also, **Shiveley v. Bowlsby,** 152 U. S. 1, 38 L. Ed. 331, 14 Sup Ct. Rep., 548, for a discussion by this court of riparian rights.

(13). "The Morgan and Magnolia cases were cited in **New Orleans M. & C. R. Co. v. Frederic,** 46 Miss., 1, 9, 10, to sustain 'the right of the owner of the land on the bank of the river to the thread of the stream, subject only to a right of passage thereon as a highway when the stream admits it.'

"It is further urged that the argument in the Morgan case 'in support of the common law doctrine as to the ebb and flow of the tide constituting a navigable stream is in direct opposition and antagonism to the reasoning and opinion of this court in the frequently cited and approved case of Genesee Chief, 12 How. 443, 13 L. Ed. 1058, decided in 1851, nine years before the opinion of the state court was handed down.' Other cases are also cited in which it is decided that riparian rights pertain to the bank, and distinguished, as it is asserted, between the rights admittedly riparian and rights of ownership of or to the bed of the river. We need not enter into a discussion of those cases, or assign their exact authority. This court has decided that it is a question of local law whether the title to the beds of the navigable rivers of the United States is in the state in which the rivers are situated or in the owners of the land bordering upon such rivers. **Packard v. Bird,** 137 U. S. 661, 34 L. Ed., 819, 11 Sup Ct. Rep. 210;**United States v. Chandler-Dunbar Water Power Co.,** 229 U. S., 53 L. Ed. 1063, 33 Sup. Ct. 667;**Kaukauna Water Power Co. v. Green Bay & M. Canal Co.,** 142 U.S.. 254, 35 L. Ed., 1004, 12 Sup Ct. Rep., 173; **St. Louis v. Rutz,** 138 U. S., 226, 34 L. Ed. 941, 11 Sup. Ct. Rep., 337; **Shively v. Bowlby,** 152 U. S., 1, 38 L. Ed. 331, 14 Sup. Ct. Rep. 548;**Hardin v. Jordan** 140 U. S., 371.

35 L. Ed. 428, 11 Sup. Ct. Rep. 808; **Jones v. Soulard**, 24 How. 41, 16 L. Ed. 604."

It will be urged, doubtless, that the case of **Arkansas v. Tennessee**, 246 U. S., page 171, has repudiated any such doctrine, but it will be seen that in that case no reference is made to the Constitution of the State of Tennessee defining the boundary line of that State, and of the decisions of the State of Tennessee prior to that of **State v. Muncie Pulp Co.**, which did not go back, as does the Mississippi decision, to the year 1844. It was not expressly embodied in its constitution, and there is not a declaration of Tennessee adopted and approved by the legislature, coming from the most distinguished Chief Justice of that State, that this interpretation of the boundary line had been accepted since 1763.

So, as to the line in Mississippi, we submit that the decision must be in accordance with our Constitution, especially, when that Constitution coincides with the Constitutional definition made in the State of Arkansas.

(b) **The eastern boundary of the State of Arkansas.** This has been defined by its Constitution, since its admission into the Union in 1836, as "the middle of the main channel of the Mississippi," thus:

> BOUNDARIES: We do declare and establish, ratify and confirm the following as the permanent boundaries of the State of Arkansas, that is to say: Beginning at the middle of the main channel of the Mississippi River, on the parallel of 36 degrees of North latitude, running thence West with said parallel of latitude to the middle of the main channel of the St. Francis River; thence up the main channel of the said last named river to the parallel of 36 degrees, 30 minutes of the North latitude, thence West with Southern boundary line of the State of Missouri to the

> Southwest corner; thence to be bounded on the West to the north bank of Red River, as by Act of Congress and treaties existing January 1st, 1837, defining the Western limits of the territory of Arkansas, and to be bounded across and South of Red River by the boundary line of the State of Texas as far as to the northwest corner of the State of Louisiana; thence Easterly with the northern boundary line of the said last named State to the middle of the main channel of the Mississippi River; thence in the middle of the main channel of said last named River, including an island in said River known as "Belle Point Island," and all other land originally surveyed and included as a part of the territory or State of Arkansas, to the 36th degree of north latitude, the place of beginning." Kirby's Dig. Stat. Ark., Art. 1, p. 49.

These declarations are in the Constitution of the State of Arkansas, and the construction of a State Constitution is a question for the State Court, and not for this Court, provided especially, when Congress has given assent thereto, as was done in the law of 1909, **supra. Oil Co. v. Missouri**, 224 U. S., 270 **Martin v. West**, 222 U. S., 196; **Walton v. Maryland**, 218 U. S., 173; **Arkansas v. Louisiana**, 218 U. S., 431.

The interpretation of this constitutional provision came before the Supreme Court of Arkansas in (2) **Cessil v. State, 40 Ark.**, 505; and we stress the proposition that this was an interpretation of its Constitution and involved, in the highest sense a decision as to its sovereignty and its jurisdiction under the construction in **Archer v. Greenville, supra.** This declaration is not from the legislature, or the governor, but it comes from the people, and is by the people, through its constitution, and is an interpretation by the Supreme Court of Arkansas, vested with plenary power in the premises, and by

this decision the eastern line of Arkansas is made to coincide with the western line of Mississippi.

While this line, so drawn by the respective Constitutions of the several states, as construed by their Supreme Courts, does not coincide with the line drawn by this Court in **Iowa v. Illinois** 147 U. S. 1, it is the line established by a construction of the Constitutions of these two states made by their several Supreme Courts, and by them at a time when there was ample authority so to do under the said Act of Congress. Their action was also impliedly approved by Congress (infra).

It will be noted that the last adjudication in Arkansas was in 1915.

Now this decision in **Cessil v. State** was approved in (3) **Delaney v. State,** 88 Ark., 311; see also (4) **Wolfe v. State,** 104 Ark., 140; (5) **Kinnanee v. State** 106 Ark., 286, 290, where the Court said:

> "The next assignment is that the Court erred in its declaration of law as to the boundary line between the States of Arkansas and Tennessee. The testimony shows that the sale occurred about 350 yards from the Arkansas shore in the stream of the river used for navigation. That from this point to a sandbar opposite the Arkansas bank is a half to three-quarters of a mile to the island a mile, and to the Tennessee Bank of the River a mile and a half or two miles; one witness thinking the island was the Tennessee shore. The island is submerged at a good stage of water.
>
> "This court, in a well considered opinion, has already declared the law relating to our eastern boundary upon the Mississippi River, after reciting that the Act of Congress admitting the State to the Union, approved June 16, 1836, designated the eastern boundary as "the middle of the main channel of the Mississippi River," which descrip-

tion is also embodied in our Constitution since that time, and, after a discussion of the meanings of the words 'channel' and 'main channel' said: 'The middle of the main channel then must mean the point or line along the river bed equidistant between the permanent and defined banks of the ascertained channel on either side.....It seems that the largest channel determines which is the river, and the central line of that makes the State boundaries.....Where there are several channels, the principal one is considered the river, and in that the **medium filum** makes the boundary. **Cessill v. State,** 40 Ark., 505.

"The Supreme Court of Tennessee has also considered and determined the matter of the Western boundary, which is the Eastern boundary of our State, in the case of **Tennessee v. Muncie Pulp Co.,** 119 Tenn., 47. It considered the boundary line fixed by the treaty of 1763, the middle of the Mississippi River, and the boundaries of the two States as fixed by the Acts of Congress admitting them into the Union, and in a well considered and exhaustive opinion, after reviewing this court's decision in **Cessill v. State, supra,** said: 'The decisions of all the courts of last resort of the several states, as well as those of the United States involving this boundary line, with the exception of those of **Buttenuth v. St. Louis Bridge Co.,** 123 Ill. 543, and **Iowa v. Ills.,** 147 U. S. 1; 202 U. S., 59, have been favorable to the contention that the line runs midway between the banks of the river, and it is only at a late day by those cases that a doubt was suggested or arose as to the true and correct line which formerly separated the British possessions in America from those of France and Spain, and subsequently a number of the largest and most influential States of the Union. The former construction has become a rule of property and should not be disturbed...

"Where a navigable river constitutes the boundary between two states, the middle of the channel separating their respective jurisdictions, both are assumed to have free use of the whole of it for the purpose of commerce.....The reasons for having a fixed, certain and visible line, such as the middle of the channel as measured from the respective banks of the river, we think greatly outweigh those advanced in support of the decision of **Iowa v. Illinois**. But the question has been settled by the duly constituted authorities of Tennessee and Arkansas by judicial decisions, legislative, and other authorized actions, long acquiescense, the exercise of jurisdiction unchallenged, and other acts amounting to an agreement or convention. The highest court of Arkansas, in a case to which the State was a party, and at its instance, in the assertion of its sovereignty, has defined the limit between the two states to be the line midway between the visible banks of the river, and enforced the criminal laws of the state up to that line.....Both states agree upon it as a true and correct line separating their territories, **and others cannot be heard to complain.** (Italics ours.)

"See also **St. L. I. M. & S. R. R. Co. v. Ramsey,** 53 Ark., 314; **Jones v. Soulard,** 24 How., 41; **Nebraska v. Iowa,** 143 U. S., 359; **Missouri v. Nebraska,** 196 U. S., 23; **Myers v. Perry**, 1 La. Ann., 372;**Morgan v. Reading,** 3 S. & M. (Miss.) 366; **Bridge Co. v. Dubuque Co.,** 55 Iowa, 558.

"The instruction given by the trial court was in accordance with the law as already declared by our court in the case of **Cessill v. State, supra,** and the boundary thus defined has been recognized and acquiesced in by the State of Tennessee, as the western boundary of that State, and the court did not err in giving said instruction.

"The undisputed evidence shows from the

Arkansas shore of the river to the sandbar opposite, which confined the stream upon which the boat was operating, was a distance of half to three quarters of a mile, that it was half a mile further to the island, and a mile from there to the Tennessee bank, and the sale was made not more than 350 yards from the Arkansas bank of the river.

"Unquestionably it occurred within the jurisdiction of this state, and the judgement of the lower court is affirmed."

This declaration comes from the very highest Court in interpreting its own Constitution, and there can be no doubt that State was acting within its own right.

It is interesting to note that Mississippi, in the Magnolia case, followed Mr. Justice Story's decision in "The Fame," 3 Mason, **supra,** and thereupon, Arkansas followed Justice Story by following the Mississippi Court in this decision.

(6). See, also **Hearne v. State,** 181 S. W. (1915), 291, where it is said:

"It is insisted that the Court erred in refusing Appellant's requested instructions embodying the legal principles as announced in his requested instruction numbered 4, and in giving instruction numbered 1,as follows:

" 'On the question of venue.....you are instructed that boundary line between the State of Arkansas and the State of Tennessee in the vicinity of the alleged crime, is the middle of the main channel of the Mississippi River as the same existed on the 16th of June, 1836, the date of the admission of the State of Arkansas and by the "middle line" of the channel of the Mississippi River is meant the equidistant point in the main channel of said river between the well defined banks on

either shore at said time, and all the water and lands which may now occupy the space between the middle line as same then existed and the Arkansas shore as same now exists is within the jurisdiction of the Osceola District of Mississippi County, Arkansas.'

"Said Instruction numbered 4 reads:

" 'Long acquiescence by one state in the possession of territory by another, and in the exercise of sovereignty and dominion over it, is conclusive of the title and rightful authority of the latter State. Therefore, if you find from the evidence in this case that the State of Tennessee for more than thirty years has exercised sole and exclusive jurisdiction, sovereignty and dominion over the place where the alleged crime was committed, and that the State of Arkansas has during that time acquiesced in the exercise of jurisdiction over the same, then the State of Tennessee has sole and exclusive jurisdiction over the territory where said crime was alleged to have been committed, and you will return a verdict of guilty.'

"The Court in its instruction numbered I also called attention to the testimony produced relating to the existence of a civil district of Tipton County, Tennessee upon Island 37, the establishment of polling places and holding elections thereon under the laws of said state, the assessment and collection of taxes upon real and personal property, and the exercise of jurisdiction by the courts of said county of Tennessee in civil and criminal proceedings against persons and property thereon, as well as testimony of the failure of the constitutional authorities of Mississippi County, Arkansas, to exercise jurisdiction thereon, and continued:

" 'This testimony is competent, and is to be considered by you, together with all the other facts and circumstances in proof bearing upon this

question of jurisdiction; but, if you find a preponderance of the evidence that the alleged crime was committed north of the middle line of the main channel of the Mississippi River, as it existed on the 16th day of June, 1836, at said place, the Osceola District of Mississippi County, Arkansas, has jurisdiction in this case, notwithstanding the exercise of the jurisdiction of the State of Tennessee thereon, and notwithstanding the failure of the legally constituted authorities of Mississippi County, Arkansas, to exercise jurisdiction over said territory heretofore.'

"(8) No mention was made of the law of Congress authorizing it, nor the statutes of Arkansas authorizing and permitting reciprocal and extended jurisdiction over offenses committed upon the Mississippi River to the west bank thereof by Tennessee and the eastern bank by the State of Arkansas.

"In **Kinnanee v. State**, 106 Ark., 286, 153 S. W., 262, this Court approved an instruction relative to the boundary line between the State of Arkansas and Tennessee, declaring the law in effect as given in said instruction No. 1 and quoted in the opinion, and holding a declaration of the Supreme Court of the State of Tennessee in **Tennessee v. Muncie Pulp Co.**, 119 Tenn., 47, 104 S. W. 437, of like effect, recognizing the boundary between the States to be as declared by the Supreme Court of Arkansas. No error was committed in the refusal of the said instruction numbered 4 and the others of like kind, for the State of Tennessee is making no claim of title herein to the territory upon which the offense was shown to have been committeed, and as held in **Tennessee v. Muncie Pulp Co., supra**, the States having agreed upon the true and correct line separating their territory, as announced in said instruction numbered one, others cannot be heard to complain."

We, therefore, have:

(a) A definition of the boundary of Mississippi as a sovereign state;

(b) A definition of the boundary of Arkansas as a sovereign State;

(c) An approval of this definition by Congress in the Act of 1909; approved by this Court in **Washington v. Oregon,** 214 U. S. 217, and under these circumstances, quite apart from what may be the true interpretation of the treaties, and what may be the line between other states of the Union, it is, nevertheless, true that as to Arkansas and Mississippi, the Constitutions of these two States fix a line, which line has been held to be equidistant from the banks, and these decisions of Arkansas and Mississippi construing the Constitutions of Arkansas and Mississippi, are conclusive upon this Court, under its decisions when the States agree under Congressional permission. The decision in **Butternuth v. St. Louis Bridge Co.,** 123 Ills., 543,**supra,** was rendered when the State of Illinois was not before the Court. That opinion saying:

> "The remaining ground of relief insisted upon is, that part of the bridge structure, which lies west of its eastermost pier, is outside of the State of Illinois, and was illegally assessed and included in the assessment with that part which is confessedly within the limits of the State. On this branch of the case, some evidence was offered, and some discussion has been had, as to the boundary lien between the States of Missouri and Illinois at the point where the bridge structure spans the Mississippi River. That question is certainly one of great gravity, and one this Court will hardly undertake to determine on the meager evidence to be found in this record, and in

a case where **neither state is represented, (Italics** ours) and where there are no defendants other than private citizens, neither of whom had the slighest **personal** interest in the matter. The utmost this Court will assume to decide is, what part of the complainant's bridge is to be regarded within the State of Illinois, for the purpose of taxation, or what is the same thing, does the valuation of complainants' property, as made by the assessor for 1885, include any portion of the bridge not subject to taxation in this state? * * *

"Notwithstanding the fact the main channel of the river might be changed by imperceptible natural wear on one side, or by the gradual formation of alluvions, still 'the middle of the main channel,' when ascertained would be the boundary of the State. It might be a slightly shifting line, hardly perceptible; still it would be a well known and easily ascertainable boundary line."

"The rule of law is, when a stream dividing co-terminous states, being a boundary line, alters its channel by a gradual or imperceptible process of wear or of alluvions, the boundary shifts with the channel."

This may be true of Illinois or of Iowa, but it is not true of Mississippi, for the Constitution and laws of Mississippi, as interpreted by its highest Court, are to the contrary.

It is to be noted that the opinion refers to the Iowa case defining the channel as containing the best exposition of the law that the Illinois Court had seen, and that Court cited as authority, (a) the Mississippi decision of **Magnolia v. Marshall,** 39 Miss., **supra,** which is **contra.** (b) **Hadley's Lessee v. Anthony,** 5 Wheat., 374, which is demonstrated to be in favor of the Defendants in Error by Mr. Justice Story in "The Schooner Fame," and (c) **Thomas v. Hatch,** 3 Summer, 170, which is a charge to a

jury by Mr. Justice Story, and which does not in any way conflict with his opinion in the case of "The Fame."

I-(b)

This Court will not reverse the judgment of the State Supreme Court because, if Iowa v. Illinois 147 U. S. 1 were held to control, still upon the practical location by the States of Arkansas and Mississippi.

In **Arkansas v. Tennessee,** 246 U. S., 172, there is a collection of the cases wherein this Court declared the circumstances exisiting upon the part of the several states which would amount to a practical location of the common boundary, (citing **Rhode Island v. Massachusetts,** 4 How. 591; **Indiana v. Kentucky,** 136 U. S., 479; **Virginia v. Tennessee,** 148 U. S., 503; **Louisiana v. Mississippi,** 202 U. S. 913; **Maryland v. West Virginia,** 217 U. S. page 1) and thereby fix a boundary upon the principles of common action, and not as held in **Iowa v. Illinois, supra.**

Turning, therefore, to the criteria thus prescribed we note:

(1). **Rhode Island v. Massachusetts,** 4 How., 591, where, at page 636, it was declared:

> "The charter is of doubtful construction, and may, without doing violence to its language, be construed in favor or against the proposition of Complainant."

So, too, the treaties in question are of doubtful construction as is evidenced by the two conflicting lines of decision ante-dating **Iowa v. Illinois, supra.**

It will be further noted, as said in that case at page 638:

"This dispute is between two sovereign and independent States. It orignated in the infancy of their history, when the question in contest was of little importance. And, fortunately, steps were early taken to settle it, in a mode honorable and just, and one most likely to lead to a satisfactory result. There is no objection to the joint commission in this case, as to their authority, capacity or the fairness of their proceeding. An innocent mistake is all that is alleged against their decision. And as has been shown, this mistake is not clearly established, either in the construction of the charter, or as to the location of the Woodward and Saffrey Station. But if the mistake were admitted as broadly and fully as charged in the bill, could the court give the relief asked b ythe complainant?

Again, at page 638, it is said:

"The possession of the respondent was taken not ony under a claim of right, but that right in the most solemn form has been admitted by the complainant and by the other colonies interested in opposing it. Forty years elapsed before a mistake was alleged, and since such allegation was made nearly a century has transpired. If in the agreements there was a departure from the strict construction of the charter, the commissioners of Rhode Island acted within their powers, for they were authorized 'to agree and settle the line between the said colonies in the best manner they can, as near agreeable to the royal charter as in honor they can compromise the same.'

"Under this authority, can the complainant insist on setting aside the agreements, because the words of the charter were not strictly observed? It is not clear that the calls of the charter were deviated from by establishing the station of Woodward and Saffrey. But if in this respect

there was a deviation, Rhode Island was not the less bound, for its commissioners were authorized to compromise the dispute. Surely this, connected with the lapse of time, must remove all doubt as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in the case of disputed boundary."

In the instant case, the States each adopted by their respective Constitutions, the interpretation of the treaties which they deemed proper. These constructions have been uniform, the one since 1817, and the other since 1836, and each State under repeated judicial decisions has laid claim to that territory which is described in and by the several Constitutions, as that to which each was entitled and no more.

What could be more just, or of greater effect than to divide the property, which has been only in constructive possession by reason of the character of the land, in accordance with the claims of the respective sovereign, independent states?

As we read this record, neither Arkansas nor Mississippi has either done anything inconsistent with the practical interpretation placed by them upon these treaties by their respective Constitutions, and certainly nothing can be more solemn than a compact of the people, evidenced by their fundamental law, which defines

this boundary, and which definition has been confirmed by numerous judicial decisions in each state.

(2) **Indiana v. Kentucky,** 136 U. S. p. 479. At page 508, the Court declared:

> "Undoubtedly, in the present condition of the tract, it would be more convenient for the State of Indiana if the main river were held to be the proper boundary between the two states. **That, however, is a matter for arrangement and settlement between the States** themselves, with the consent of Congress." (Italics ours.)

Here we have such consent evidenced by the Constitution, which, under this decision, is conclusive.

Urged against this practical construction of the several Constitutions, we have the testimony of expert witnesses, and in that decision this Court dealt with the declarations of such witnesses, thus: "aside from

> the speculations of geologists, which are not of a very convincing character, the evidence consisted principally of the recollections of witnesses, which were more or less vague and imperfect. Apart from those speculative theories, she produced no evidence that at the time the cession was made by Virginia to the United States in 1784, or when Kentucky became a state, the tract was attached to and formed a part of the territory then ceded out of which the State of Indiana was created, or that the waters of the Ohio did not run between it and the main land of Indiana so as to justify its designation as an island in the river."

In the instant case, we have the same speculations as to what may have been, or may not have been the channel. We have some testimony, clouded by the mists, which necessarily attends transactions, going back nearly seventy-five years.

As was said in the same case, quoting **Vattel**:

> "The tranquility of the people, the safety of states, the happiness of the human race do not allow that the possessions, empire and other rights of nations should remain uncertain, subject to dispute and ever ready to occasion bloody wars. Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title."

And here we apply, with great force, the declarations of this Court:

> "The facts as they existed at the time of the cession of Virginia to the United States in 1784, and even at the time of the admission of Kentucky into the Union, have long since passed beyond the memory of man, and therefore cannot be established by oral testimony. As counsel says, the very grandchildren of men then living are now hoary with age. The facts can only be established as a matter of inference from general facts in regard to the condition of the country, and documentary evidence which in many cases rises little above that of hearsay, such as notices by travelers and maps given by them indicating the position of the tract in question. Of the latter it may be said that they all represent the tract as an island in the river."

So, here, these facts to overcome the practical interpretation, are mere speculative fancies and do not in any way prove that which is requisite in the premises. The reason therefor is accurately set forth in that same case:

> "Great changes in the bed of the river were to be expected from the immense volume and flow from its vast water-sheds. These water-sheds, ac-

cording to the official report of the Tenth Census of the United States, cited by counsel, comprise over two hundred thousand square miles, and more than half of the water from them comes from east of Green River Island, and nearly all the great water courses find their way to the Ohio River. That vast changes should be made in the channel of that river from the volume of water thus received, and its impetuous flow at certain seasons wearing away its banks, deepen some portions of the stream and filling up others, was not surprising; and that where large vessels at one time could easily float should have become dry ground many years afterwards was but the natural effect of the tremendous force thus brought into operation."

And so, here we have the changes necessarily incident, and in addition to those mentioned is that which came from the construction of the Mississippi Levee that necessarily forced a swifter current through this old lake than would otherwise have been the case.

Note, also, that the waters running across this territory had but a short distance to go before they flowed into the Mississippi again at a lower point, and that there would be a natural cut off through the channel beginning immediately south of Friars Point and running down to the river at the point in Section 11, Township 28, Range 5, where the water would break into the river again near the tow head there delineated.

(3). **Virginia v. Tennessee,** 148 U. S., 503, is directly controlling in this aspect. That was a suit to establish by judicial decree the true boundary line between Virginia and Tennessee. There the original jurisdiction was sought by Virginia and Tennessee promptly responded, and the nature of the controversy was set out in full. A line was run and this line "was accepted by both states

as a satisfactory settlement of a controversy which had, under their Governments and that of the colonies which preceded them, lasted for nearly a century. As seen from the acts recited, both states through their legislatures declared in the most solemn authoritative manner that it was fully and absolutely ratified, established, and confirmed as the true, certain and real boundary line between them, and this declaration could not have been more significant had it added in express terms what was plainly implied, that it should not be departed from by the governments of either, but should be respected, maintained, and enforced by the governments of both. All modes of legislative action which followed it indicated its approval. Each state asserted jurisdiction on its side up to the line designated, and recognized lawful jurisdiction of the adjoining state up to the line on the opposite side. Both states levied taxes on the lands on their respective sides and granted franchise to the people resident thereon..... The courts of the two states exercised jurisdiction, civil and criminal, on their respective sides, and enforced their process up to the line, and the legislation of Congress in the designation of districts for the jurisdiction of Courts and in prescribing limits for election districts and for puposes of electon made no exception to the boundary as thus established."

In the instant case we have (a) establishment of the line by the Constitution; (b) there were no inhabitants of the territory by reason of its character; but (c) the Courts of Mississippi and of Arkansas recognized the true dividing line in their respective decisions; and (d) Congress not only expressly authorized the adjustment, but passed all of those acts which are referred to in the Virginia-Tennessee case as approving it by implication.

Still this line was not actually laid out, yet the principles of law which were to govern in its demarcation were clearly set forth by Mississippi, wholly apart from any concurrence with Arkansas, and by Arkansas, wholly apart from and without any concurrence of Mississippi.

In short, each acted by its Constitution without reference to action by the other, and as said in that case,

> "Independently of any effect due to the compact as such, a boundary line between states or provinces, as between private persons, which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant; and the line so established takes effect not as an alienation of territory, but as a definition of the true and ancient boundary. Lord Hardwicke, in **Penn v. Lord Baltimore**, 1 Ves. Sr. 444,448; **Boyd v. Graves**, 17 U. S., 4 Wheat, 513; **Rhode Island v. Massachusetts**, 37 U. S. 12 Pet. 657, 734; **United States v. Stone**, 69 U. S. 2 Wall, 525, 527; **Kellog v. Smith**, 7 Cush., 375, 382; **Cheney v. Waltham**, 8 Cush. 327. **Hunt Boundaries** (3rd Ed.) 306."

Again, in that same case:

> "But to this position, there is in addition to what has already been said, a conclusive answer in the language of this court in **Pool v. Fleeger**, 36 U. S., 11 Pet. 185, 209. In that case Mr. Justice Story, after observing that 'It is a part of the general right of sovereignty belonging to independent nations, to establish and fix the disputed buondaries between their respective territories, and the boundaries so established and fixed by compact between nations become conclusive upon all the subjects and citizens thereof, and bind their rights, and are to be treated, to all intents and purposes, as the true and real boundary' adds: "This is a doctrine universally recognized in the law and practice of nations. It is a right equally belonging to the States of this Union, unless it has been surrendered under the Constitution of the United States. So

far from there being any pretense of such a general surrender of the right, it is expressly recognized by the Constitution, and guarded in its exercise by a single limitation or restriction, requiring the consent of Congress.' The Constitution in imposing this limitation plainly admits that with such consent a compact as to boundaries may be made between two States; and it follows that when thus made it has full validity, and all the terms and conditions of it are equally obligatory upon the citizens of both States."

This action of Mississippi and Arkansas has received the same sanction that was pointed out in the Virginia-Tennessee case, and in addition, an express ratification by Congress, which is conclusive in the premises.

It is very doubtful whether there is any agreement between Arkansas and Mississippi within the terms of the prohibition of the Constitution. The line was in doubt. Independently of Arkansas, Mississippi defined the line; then independently of Mississippi, Arkansas defined the same line. There was no joint action. Each State claimed, and claims jurisdiction to the same line, by their Constitutions without reference to any agreement with its sister State. With deference, we submit that it does not come within either the reason or the prohibition of the Constitution. **Virginia v. Tennessee, Supra.**

(4). In **Louisiana v. Mississippi,** 202 U. S., at page 53, this Court said:

"Moreover, it appears from the record that the various departments of the United States Government have recognized Louisiana's ownership of the disputed area; that Louisiana has always asserted it; and that Mississippi has repeatedly recognized it, and not until recently has disputed it.

"The question is one of boundary, and this court has many times held that, as between the states of the Union, long acquiescence in the asser-

> tion of a particular boundary and the exercise of dominion and sovereignty over the territory within it should be accepted as conclusive, whatever the international rule might be in respect of the acquisition by prescription of large tracts of country claimed by both. **Virginia v. Tennessee** 148 U. S., 503, 37 L. Ed. 537, 13 Sup. Ct. Rep. 728; **Indiana v. Kentucky,** 136 U. S., 479, 34 L. Ed., 329, 10 Sup. Ct. Rep. 1051; **Missouri v. Kentucky,** 11 Wall. 395, 20 L. Ed. 116;**Rhode Island v. Massachusetts,** 4 How., 591, 11 L. Ed. 1116."

Here, Arkansas has never yet constitutionally disputed the claim of Mississippi. Its Constitution fixed this line, and being the supreme law of the State of Arkansas, there is no one who can dispute that which constitutes a part of this fundamental law, and this fudamental law is binding upon all parties to its creation, just as is the fundamental law in Mississippi to identically the same effect. The case in question is a far stronger case than that decided against Mississippi in favor of Louisiana.

(5). In **Maryland v. West Virginia,** 217 U. S., 1, there was a controversy as to the boundary line between Maryland and West Virginia, and it there appeared that the contention of Maryland with reference to the headwaters of the Potomac was correct; but that, notwithstanding the line had formerly been run for years from the so-called Fairfax stone, and notwithstanding the terms of the treaty gave title to the so-called Potomac meridian, yet this Court gave title under the practical interpretation placed thereon by the parties.

What could be more important than to establish it in the present case? And as said in Wheaton on International Law:

> "The writers on natural law have questioned how far that peculiar species of presumption arising from the lapse of time, which is called prescription, is justly applicable as between nation and na-

tion; but the constant and approved practice of nations shows that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one state excludes the claim of every other in the same manner as by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question. Pt. 2, Chap. 4, Sec. 164."

So that ,in that case we have (a) the Constitution of two States: (b) numerous decisions of each State, hereinbefore set forth; (c) a ratification of the principles governing the line uniformly through this period of years, and where the property is subject to annual overflow to determine under the decisions of this court, the line between these States. We submit that, even though the treaties may have located the line according to the decision of **Iowa v. Illinois, supra,** a practical interpretation thereof will be made, and the line will be controlled by the actions of the States who are alone thereby affected.

I-(c)

This Court will not reverse the judgment of the State Supreme Court because the record shows a case wherein the party upon which the burden of proof rested failed to meet it, and without application for continuance, judgment was rendered.

This controversy is between the States in their sovereign capacities, and where they have each established a rule delineating the identical line as their respective boundaries, then that line, so thus delineated, should, if possible, be followed.

Avulsions do not operate to change the boundaries of the respective states. In **Arkansas v. Tennessee,** 246 U. S., 173, it is said:

"It is settled beyond the possibility of dispute that where running streams are the boundaries between States, the same rule applies as between private proprietors; namely, that when the bed and channel are changed by natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream; while if the stream from any cause. natural or artificial, suddenly leaves its old bed and forms a new one by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel. **New Orleans v. United States**, 10 Pet. 662, 717, 9 L. Ed. 573, 594; **Jeffries v. East Omaha Land Co.**, 134 U. S. 178, 189, 33 L. Ed. 872, 876, 10 Sup Ct. Rep. 518; **Nebraska v. Iowa**, 143 U. S., 359, 361, 367, 370, 36 L. Ed. 186, 187, 189, 190, 12 Sup. Ct. Rep. 396; **Missouri v. Nebraska**, 196 U. S., 23, 34-36, 49 L. Ed. 372, 374-376, 25 Sup Ct. Rep. 155."

(1). The cases there cited are uniform in so holding. In **Iowa v. Illinois**, 147 U. S., 1, quotes, to approve, Wheaton's Elements of International Law, (8 ed.) thus:

"And in Section 202, while thus stating the rule as to the boundary line of the Mississippi River for the middle of the channel, states that the channel is remarkably winding, crossing and re-crossing perpetually from one side to the other of the general bed of the river."

(2). And, again, in that same opinion is quoted from **Dunleith, etc. v. County**, 55 Iowa, 564, thus:

"The course of navigation, it is said, which follows what boatmen call the channel, is extreme-

> ly sinuous, and often changing, and is unknown except to experienced navigators. * * * The center of this river channel may be readily determined while the center of the navigable channel often could not be known with certainity. The first is a fit boundary line of a state; the second cannot be."

There are thus laid down two principles (a) the sinuosity of this channel; (b) its constant and persisting change.

In addition, there is a third element which must be integrated into the equation, viz, What is the character of navigation that is to control? It begins with the Indian floating in his birch bark canoe, and ends with the tow boats bringing down their immense cargoes to the mouth of the river, and between the two is the period of floating palaces upon the river.

The channel of commerce in 1817 controls. **Washington v. Oregon**, 211 U. S. **supra**; S. C. 214 U. S. **supra.**

So that between the period of 1763 and the present day, there have been most marked changes in the character of navigation. The powerful agency of steam has been brought into subjection, to be succeeded, possibly, by that of gasoline or electricity. So that, in order to determine the channel of navigation, both the time and the place and the circumstances must be considered.

This Court is asked to fix, as of the date of an avulsion, the time of which is uncertain to the extent of possibly ten years, the channel of commerce at a definite point.

There can be no dispute but that at some time the current of the Mississippi River did run at the south point of Horseshoe Island close to the Mississippi shore,

but what was that course when it cut through the center of Section 10? There is no living witness who can say with certainty.

Turn to the field notes of Section 10, Township 4, Range 4, in Arkansas, and it will be seen: (**Arkansas v. Mississippi**, Original No. 7.)

That across that fractional township in Section 10 the meander line of the river at the east side (Tr. page 655, bottom) shows a most marked concave surface, indicating that at that point there was a cutting of the river.

Note the meander line at S. 12° West 20.55 chains (note the error on the plat as to 45-100); thence S. 5° West 11.50 chains; thence S 15° East 30 chains, the contour of which is evidently by the plat annexed. The extent of the angle is further manifested by said plat.

Note, further, that shortly north of the center of Section 10, which is only approximately 40 chains across, there is a bayou running from East to West only about a quarter of a mile north of the center of said Section 10.

Then note further that on the west side of this narrow strip the meander line shows (p. 659); thence up the river through Section 10, Township 4, S., Range 4, E. 60 ch. S. 7°, W. 21 ch. to the corner of fractional Sec. 10 and 15.

It will appear that both sides of this fractional section were concave, evidencing the fact that there was at that date the influence felt of the Mississippi River upon the banks. They do not appear in this cause.

Add the location of an island in Mississippi four chains off shore, (which it is testified can be located with comparative ease by one witness) midway between

Sections 30 and 31 of Township 29, Range 4 West, showing that in 1835 the current of the stream was on the opposite shore; and then notice that all of the original timber upon the island has been washed away east of a certain line; and then notice, further, that the Mississippi river in Township 28, Range 5 West, runs north, and then runs south again; so that at the point in question opposite the Horseshoe Lake the entire distance between the Mississippi River is covered by less than two and a quarter miles, and that in this two and a quarter miles the transcript shows lakes existing of two chains, (Tr. 704) and 4 chains (Tr. 704) the outline of which may be seen upon the plat annexed; and then bear in mind the constancy of the change in the currents due to the conditions up the river; and then note the rule as stated in **Illinois v. Iowa**, 147 U. S., 8, quoting to approve Creasey in his First Platform on International Law, thus:

> "It has been stated that where a navigable river separating neighboring states, the thalweg, or middle of the navigable channel forms the line of separation. Formerly a line drawn along the middle of the river, the **medium filum aquae** was regarded as the boundary line; and **still will be regarded prima facie as the boundary line**, except as to those parts of the river as to which it can be proved that the vessels which navigate those parts keep their course habitually along some channel different from the **medium filum**. When this is the case, the middle of the channel of traffic is now considered to be the line of demarcation." (Italics ours.)

Furthermore, as was said in the same authority, quoting to approve Halleck in his Treatise on International Law,

> "But the deeper channel may be less suited,

> or totally unfit for the purpose of navigation, in which case the dividing line will be in the middle of the one which is best suited and ordinarily used for that object."

Now, in the instant case, under this decision there is a prima facie presumption that the boundary line coincides with that prescribed by the Constitutions of Arkansas and Mississippi as interpreted by their Supreme Courts, and there is no proof what ever that the deeper channel, if such it was at the time of the avulsion, as to which there is no proof, was the better suited for navigation.

With the utmost confidence, we, therefore, submit the rule to be, that the presumption of fact obtains until the party upon whom the burden of proof rests shall have met it by showing facts to the contrary, and by evidence of sufficient weight to overcome the presumption.

Again, in **Arkansas v. Tennessee**, 246 U. S. 177, this principle is directly recognized in paragraph 5, p. 177, when the Commission appointed to locate that line were directed to ascertain "the nature and extent of the erosions and accretions that occurred in the old channel prior to its abandonment by the current as a result of the avulsion in 1876, and the question whether it is practicable now to locate accurately the line of the river as it then run." And this question was referred "to said Commission, subject to a review of its decision by this Court, if necessary."

In pursuance of that decision, an interlocutory decree was rendered, 247 U. S., 462, where the decree recites:

> "In the event the said commission cannot now locate with reasonable certainty the line of the

river as it then ran, that is, at or immediately before the avulsion of 1876, it shall report the nature and extent of the erosions and accretions that occurred in the old channel and prior to its abandonment by the current as the result of said avulsion, and in said report, if necessary to be made in obedience to this paragraph of the decree, said commission shall give its findings of fact and the evidence on which the same are based."

It will thus be seen that in this instance this Court reverted to the principle of **Iowa v. Illinois, supra**, and approved the doctrine that where the proof is not clear, the presumption is not overcome, and the channel will be located in accordance with the Constitution of the several States.

This rule is laid down in **State v. Keane**, 84 Mo. App., 130, where it is said:

"The sole question for decision is, in which State was defendant's saloon located when the sale was made. The case was submitted to the Circuit Court on an agreed statement of facts whereby it appeared that prior to the year 1881, the Missouri River at the place in controversy, made a bend in the shape of a horseshoe, with the toe pointing to the north and the heel to the South. In that year the high waters caused the river to suddenly change its course, and to cut directly across the heel of the shoe instead of flowing around the bend as formerly. The old course was abandoned by the stream and left a bed or tract of dry land.

"And it is in this old bed of the river that defendant's saloon was located. The navigable stream at this point was next to the Missouri shore * * * If the middle of the old river, to

measure from bank to bank, is the boundary line between the two states, as contended by the prosecuting attorney, then the sale was made in Missouri, and the defendant was rightfully convicted. The question involved here is one of great importance."

There is a review of many of the pertinent decisions, with the conclusion of the Court thus stated:

> "But the expression that the boundary will remain in the center from bank to bank of the old river bed is correct in all those cases where no showing has been made of where the navigable channel was. For, in the absence of proof on that subject, it will be taken to be in the center of the old bed located from bank to bank. Creasey's First Platform on International Law, Section 231; **Iowa v. Illinois supra.**"

In order to overthrow the **prima facie** presumption, which favors the constitutional line, something more than conjecture is required. This presumption is **prima facie** evidence and exists until fully and completely rebutted by proof.

That proof does not exist in this record.

> In **Moore v. McGuire**, 205 U. S., 214, it was held that "evidence which goes no further than to raise a doubt as to whether the main channel of the Mississippi River has not at different times varied from one side of Island 76 to the other will not support a finding that this channel ran to the west of the island when Mississippi was admitted to the Union, and was, therefore a part of that State, when such finding is opposed by the testimony from memory and tradition, by the presumption from the establishment of the channel

on the east side for a time running back nearly or quite to the admission of Arkansas, and by concensus of action on the part of the two States concerned and the United States."

An examination of that opinion shows that there was a finding of fact made by the District Judge, and this finding of fact was reversed by this Court, notwithstanding there was to be found, as said by this Court, that a map in Samuel Cummings, Western Navigator, Philadelphia, 1822, Vol. I, indicated the channel on the Arkansas side, and that in the Navigator of Zadok Kramer it so showed for the year 1817, "that the channel was good on both sides"—the very year that Mississippi was admitted into the Union.

Now the map of 1821 which is introduced and relied upon by the complainant in Original No. 7, was expressly referred to in that opinion thus (p. 222):

> "As against this consensus of action on the part of the two states concerned and of the United States (which we have here in the instant case, under an Act of Congress and the Constitutions of Arkansas and Mississippi) this presumption formed the establishment of the channel for a time running back nearly or quite to the admission of Arkansas; and this testimony from memory and tradition."
>
> "The chief reliance of the defendants is upon certain maps and statements in a letter to which we shall refer.
>
> "The first and most important of the maps is one of 'a reconnoissance of the Mississippi and Ohio Rivers,' made during the months of October, November and December, 1821, by two captains and a lieutenant of engineers under the direction of the Board of Engineers. This exhibits Chateau Island with a dry sandbar on the Mississippi side,

and indicates by dots that the channel is to the west. If the distances are accurate the sandbar at the top approaches pretty near to Mississippi; but in view of the small scale of the map and the absence of measurements, there is no sufficient warrant for assuming that the distances are accurate.

"As to the indication of the channel, it would not be surprising, considering the short time during which the reconnoiter extended, if it had been determined by nothing more than the visible width. **But in any event it hardly would do more** than confirm a conjecture suggested by other sources which we shall mention, that in some years the western passage was as good or better than the more permanent one to the east." (Italics ours.)

Thus, this Court has directly passed upon this map of 1821, which was made the predicate of so much of the testimony, and has held that it was not of sufficient probative force, when supported by far stronger evidence than occurs in this record, upon which to base a finding of fact.

Now in the Moore case, the Appellee had (1) this map; (2) a map of January 2, 1829 showing the Arkansas shore sectionized, and which map could be made the subject of speculation, but without material aid to either side; (3) a map of Benjamin Griffith showing the land divided up as a part of the township in Mississippi, and containing other slight indications that the draftsman recorded the island as belonging to Mississippi. It is true there was another map which somewhat counteracted this, by the same party; (4) there is, in addition, considerable correspondence between the Department at Washington and the State of Mississippi, wherein this contention was sustained; and, finally (5) there is Samuel Cummings' Western Navigator, and the Navigator

published by Zadok Kramer, making a similar showing, and yet, this Court reversed the decree of the lower court,and held that this map of 1821, when supported by these other and numerous circumstances, was not sufficient evidence upon which to found a decree contravening the solemn action of the States; and, may we add, in this case, of the people of the States taken in their fundamental law, their Constitutions, and concurred in, in one case as declared by its Chief Justice, for over a century, and the other since its admission to the Union in 1836.

Given these factors, (a) the character of navigation; (b) the sinuosity; (c) its constant change,—there is in this record no evidence which ought to overcome the **prima facie** presumption that the line is equidistant between the fixed banks of the Mississippi River?

Given, also, the evidence of the principal witnesses, negroes who lived in the vicinity, and by whom, on cross examination, complainant proved (p. 171) that this washing of the old river occurred in 1857, during the high water in July.

But the trouble does not stop here.

In 1816, a large island is shown at the foot of that which was Township 4, Range 4, East, in Arkansas, and this island seems to contain, from the plat record, at least 160 acres of land, and not to have been a part of Sections 22 and 23; but the total acreage is given, upon the exhibit, as 1504.18, which is made up of acreage in Section 2, 156.23; in Section 10, 431.78; in Section 14, 323. 63; in Section 15, 375.90; in Section 22, 56.23; in Section 23, 12.07. (See Plat in No. 171, page 283.)

It thus appears clearly that the island in question was not sectionized, nor was its area included in the area assigned to the State of Arkansas by the survey made by the United States.

An examination of the channel of the Mississippi River shows that the channel which lies on the north side of this island was the wider, and it further shows that it was concave throughout nearly its entire length, thus indicating deep water and the influence of the current upon the bank, and it was very much easier to navigate than the channel which ran around this island, and, if time was to be conserved and convenience consulted, a boat would run to the north rather than to the south.

In **Missouri v. Kentucky,** 11 Wall., 395, this Court, speaking of the treaties declared:

> "And this line established by the only sovereign powers at that time interested in the subject has remained ever since as they settled it. It was recognized by the treaty of peace with Great Britain in 1783, and by different treaties since then, the last of which resulted in the acquisition of the territory of Louisiana.....The boundaries of Missouri, when she was admitted into the Union as a State in 1820, were fixed on this basis, as were those of Arkansas in 1836, and Kentucky succeeded in 1792 to the ancient right and possession of Virginia, which extended, by virtue of these treaties, to the middle of the bed of the Mississippi River, and it was held that Wolf Island remained a part of Kentucky, even though the main channel did shift to the east thereof.

This rule was reaffimed in **Indiana v. Kentucky,** 136 U. S., 479.

So that, if this island belonged to Mississippi in 1817, its title thereto, if it still continued to exist, was not divested, and accretions forming therefrom would belong to Mississippi and not to Arknasas.

What the subsequent developments with reference

to this island are, there is no proof whatever in this record, nor is there any proof as to the line at the beginning and ending of the old channel. This island may have, and doubtless did, under the influence which washed away so much of the point of Section 23, have moved to the West considerably, and in so doing have perpetuated Mississippi's title and claim; but these developments are now all clouded by the ever moving current of time, and the presumption to be indulged will do justice to each by dividing equally that which is sought to be partited. Whereas to follow the alleged line claimed for the State of Arkansas would be to award practically nothing to Mississippi, and to give to the State of Arkansas many thousands acres of land, upon a conjecture that does not overcome the presumption to the contrary.

The claim of Arkansas is that Horseshoe Island contained a fraction over 4000 acres. This claim is not supported by the evidence.

The land, constituting all of "Horseshoe Island," was at one time owned by Mr. Thomas W. Stringer, who died, as shown by Transcript, p. 363, intestate, in 1893, leaving as his widow, Lydia A. Stringer, and it is averred that at his death he owned all that tract of land known as "Horseshoe Island" and more particularly described as follows: All of fractional Section 2, except, the North half of the Northwest quarter; all of fractional Section 3; all of fractional Section 10; all of fractional Section 14; all of fractional Section 15; all of fractional Section 22; all of fractional Section 23, all in Township 4, Range 4, and with accretions, containing 808.42 acres more or less.

Under the Arkansas statute (Code of Arkansas 1894, secs. 192-195) when lands are sold for debt, they must be appraised and viewed by the appraisers, and George Walker, S. I. Clark and W. H. Stone (Tr. 386) appraised this land at $1.50 an acre, and fixed its quan-

tity as **808.42** acres, and it was actually sold on this basis to W. A. Rust (Tr. 369.)

Add to this 808.42 acres the North half of the Northwest quarter of Section 2, and this would amount to one-half of 119.78 acres or 59.89 acres, which added to 808.42 would give a total area of "Horseshoe Island," claimed by said Stringer, under his rights in Arkansas, of, not exceeding, 868.31 acres.

It is true that the Rust Land and Lumber Company paid taxes in Arkansas upon an acreage somewhat in excess of this, but this does not alter the fundamental fact that the owner of all Horseshoe Island, with the accretions, claimed as the extent of that ownership this amount of acreage, and that Rust took title on this basis.

Given the necssary cutting away by the river, there was a fixation by the owner of the amount which remained at less than 900 acres. How he arrived at this aggregate is now unknown to any person, and can only be guessed. But that,actuated by ownership, he should have claimed only this amount, is a potent circumstance of far reaching meaning. So, how this figure of 4000 acres was arrived at is left to conjecture.

With a **prima facie** presumption, can it be said that the presumption has been overcome by evidence?

I-(d)

This Court will not reverse the judgment of the State Supreme Court, because the extent of the ownership of the Plaintiff in Error stopped at Highwater mark upon the Arkansas Shore.

The affirmance of the judgment of the Supreme Court of Mississippi was in accordance with its rules and practice.

Rule 11 of the Supreme Court of Mississippi provides: "No judgment shall be reversed on the grounds of misdirection to the jury, or the improper admission or exclusion of evidence, or for error as to matter of pleading or procedure, unless it shall, affirmatively appear, from the whole record, that such judgment has resulted in a miscarriage of justice."

If the right result was reached in the court below, the judgment will be affirmed, even though it was reached by wrong methods, or even by accident. **Insurance Co. v. Bank,** 71 Miss. 608. Errors of law will not reverse where, upon appellants own showing, the judgment was manifestly right. **Bell v. Medford,** 57 Miss. 31. The judgment will not be reversed for an erroneous charge, if it be manifest that the correct result has been reached. **Dozier v. Ellis,** 28 Miss. 730; and the giving of an erroneous instruction is no ground for setting aside the verdict where it is clearly right upon the law and the facts. **Wiggins v. McGimpsey,** 13 Sm. & M. 532; **Head's Case,** 44 Miss. 731; **Evan's Case,** 44 Miss. 762. A verdict will not be set aside where it is apparent upon the whole record that verdict is right on the facts. **Hill v. Calvin,** 4 How. (Miss.) 231; **Pritchard v. Meyers** 11 Sm. & M. 169.

The affirmance by Supreme Court, irrespective of the instructions given or refused, in the trial court, was correct.

The Supreme Court of Mississippi reviews the entire record, and looking back over a completed trial determines the correctness, **vel non,** of the judgment. If the instructions, whereunder Plaintiff in Error was awarded the accretions in Arkansas after the avulsion, are incorrect, should the Supreme Court have closed its eyes to the error therein? That it did not do so is manifest by its decision in the light of the briefs, certified to this Court, and filed as an appendix to our principal brief.

(a) The right of the Plaintiff in Error, under the Arkansas decisions, never attached to the soil below the high water mark—the bed of the stream being held forever by the State in trust for its citizens. **State v. Parker** 132 Ark 321; **Barboro v. Boyle** 119 Ark. 383; **Railway v. Ramsey** 53 Ark. 314; **Wallace v. Driver** 61 Ark. 429. This rule has been recognized by this Court. **Arkansas v. Tennessee** 246 U. S. 176.

(b) Avulsion fixed irrevocably the interstate boundary, and it is not thereafter altered by accretion, even though there appear dry land in the former bed. **Arknasas v. Tennessee** 246 U. S. 173;**Cissna v. Tennessee**, 246 U. S. 296; **State v. Pulp Co.** 119 Tenn. 47;**Stockley v. Cissna** 119 Tenn. 135 (both approved upon this point by this Court); **Nix v. Pfeifer** 83 S. W. 951; **Cessill v. State** 40 Ark. 504;**Nebraska v. Iowa** 143 U. S. 361; **Missouri v. Nebraska** 196 U. S. 33; **New Orleans v. United States** 10 Pet. 662.

There is not a decision which we have found that, after an avulsion, conferred title in the former bed by accretion; certainly not any in this Court or controlling in this cause.

(c) The record in this case is destitue of proof as to (1) The location of the high-water mark upon the Arkansas shore in 1848; (2) of the thread of the stream at the time of such avulsion; and (3) of any fact or factor which would cause the line to be run otherwise than in accordance with the line equisdistant from the fixed banks under the decisions in **Iowa v. Illinios**, 147 U. S. 1. There is no attempt at fixing the steam boat channel, or to show that the steam boats were the means of transportation which were to fix the channel of commerce in 1817. If, when Mississippi was admitted to the Union in 1817, the channel of commerce would have been fixed by the course pursued by the flat boats, then, upon the subsequent introduction of the newer method of water transportation

by steam boats, there would not be a relocation of the line to conform, **Washington** v. **Oregon** 214 U. S., 205; S. C. 211 U. S. 127.

There is no proof whatever that, at the time of the avulsion, the channel had changed from the middle of the river, or that the alleged channel was in any way suitable for navigation. **Iowa v. Illinois** 147 U. S. 9. Plaintiff in Error with the burden of proof resting upon him to show ownership, to justify his wanton trespess in taking possession, wholly failed to meet this burden of proof.

(d) There was a complete failure to trace title with reference to the Island shown off the Arkansas shore in 1817. That court declaring in **Cessill v. State**, 40 Ark. 504:

> "For if the main body of water were to find a new channel and abandon the old one, leaving intervening lands in a natural state, the old boundary would be still ascertainable, and would govern. This has been decided in the case between Kentucky and Missouri (**infra, 11 Wall** 395), and results, with regard to surveyed lands, from the additional clause above noted, in the Constitution of 1864. It seems that the largest channel determines which is the river, and the central line of that makes the boundary."

Under the Constitutions of both Mississippi and Arkansas, whatever was once a part of the State continues to be a part of the State, notwithstanding a change in the channel of the river. Both States, with the permission of Congress, have so ordained, and under this declaration, there could be no question that the portion of land where from the timber was cut, as it was actually surveyed by the United States as a part of Mississippi. and so delineated upon the official map, was and continued to be in Mississippi. Especially, when that portion is now above

water by reliction, and has been located and claimed by the Mississippi owner for a long period of years.

Plaintiff in Error occupies the attitude of one having title to 68 acres of land, assessed at a valuation of $275.00 demanding title to some 4000 acres, as an accretion, and which has not been taxed. This would be proper, if it was still the property of the State, and wholly improper if it was the property of the Plaintiff in Error. It might well be claimed that Plaintiff in Error thereby was precluded from asserting title by the maxim **nemo allegans suam turpitudinem est audiendus.** If the property belonged to the State, it was not taxable; if to the Plaintiff in Error, it was taxable, and what could be a stronger circumstance to show that Plaintiff in Error did not have title below the high water mark than for a period of nearly twenty years it had made no return of this property for taxation. It is not unjust to admeasure its protection from the State by the performance of its duty to the State.

(e) The emergence of dry land in the former channel of the river, after avulsion, does not constitute accretion. **Stockley v. Cissna** 119 Tenn. 152. See, also, cases collated hereunder under (b).

(f) As said in the Cissna case: "Its location in 1823 may be said to be a conceded fact. Every presumption is in favor of the permanency of the location of such lines. It is of the highest importance that their location should be certain and fixed. When a claim is made that a line of this character has been changed by the forces of nature, it must be supported by the clearest and most satisfactory evidence." This is a sound principle.

It is shown in this case at bar that in recent years there has been a considerable change in the amount of water in Old River due to the formation of a bar in front

of it on the Mississippi side. We have the testimony brought out by Plaintiff in Error of how this Old River was washed out in 1857, and yet, in spite of this testimony, this Court is asked to indulge a presumption that its present depth is uniform from the date of the avulsion to the present time, and this by one whose line does not come within nearly a mile of any possible point of contact.

The Plaintiff in Error, notwithstanding the instructions, is shown by the record not to have any title that could draw in question the determination of the State boundary, as examination of the briefs filed in the Supreme Court of Mississippi will demonstrate. The appellee, Defendants in Error, were not content to have their rights adjudicated upon the theory which is attempted to be presented here as the sole controlling factor, but proceeded in that Court upon the theory, the instructions to the contrary notwithstanding, that the present Plaintiff in Error wholly failed to prove a title in itself, for the reasons hereinbefore set forth, and, therefore, no federal question could arise.

Counsel (Bf. 3) contends: "It thus appears that if the land in question is in Arkansas, it belongs to the Plaintiff in Error, as accretions to Sections Twenty-two (22) and Twenty-three (23)."

Therein lies a fundamental error; for, as was said by Isom White (Tr. 20), when Plaintiff in Error had invaded, confessedly, Mississippi territory, and demanded the delivery of the timber in controversy:

> "Q. Well, what did they say, if you did not let them have it?
>
> "A. Said if we did not let them have it, why, of course they were going to put us in jail."

Whereupon, Instruction No. 2 (Tr. 160) was given for Defendants in Error:

"The Court instructs the jury, that should they find from the evidence, that the plaintiffs cut the timber in controversy in good faith, by authority of King and Anderson.....who **bona fide** claimed the lands.....and the defendant, by force or intimidation, took the timber away from them, then the plaintiffs have made out a **prima facie** case, and it devolves upon the defendant to show by a preponderance of the evidence that it is the **owner of the land from which the timber was cut,** before defendant can recover in this cause"; (Italics ours).

Thereby is enunciated a **rule of evidence under** which in order to recover, title in defendant must have been proved. **Liberman v. Clark**, 114 Tenn., 126.

This burden of proof was not met; we may surmise that there was a reason therefor, and in this we would not err, because in the record, in No. 7, Original, **Arkansas v. Mississippi** (Tr. 368) in this Court it appears that one Thomas W. Stringer was the owner of the land described as:

"**All of that tract of land known as Horseshoe Island,** and more particularly described as follows: "All of Fractional Section two (2), except North half of Northwest quarter; all of fractional section three (3), all of fractional section ten (10), all of fractional section fourteen (14), all of fractional section fifteen (15), all of fractional section twenty-two (22), all of fractional section twenty-three (23); all in township four (4), South of range four (4) East, with accretions thereto, **containing eight hundred and eight and forty-two hundredths (808.42) acres.**" (Italics ours).

Turning to the governmental plat, the total acreage of Horseshoe Island in 1816 is given as: 1504.18, but as said Stringer did not own the North half of the North-

west quarter of fractional section two (2), (said subdivision containing, as per plat, 119.78 acres), we deduct one-half thereof or 59.89, leaving an actual area, as surveyed in 1816, of 1444.29 acres.

Now the recital of the petition to sell in Stringer's estate shows that "with accretions," said sections contained "808.42 acres." The difference between said 1444.29 acres and this 808.42 acres had disappeared.

Under the laws of Arkansas, there was an appraisement of this property, (Tr. 368), Original No. 7, by George Walker, S. I. Clarke and W. H. Stone, who appraised said land after "viewing it," as containing 808.42 acres, at $1.50 per acre.

The laws of Arkansas, beginning in the Code of 1874, Sections 177, 178, 179 and 180, brought forward as Sections of S. & H. Code, 1894, as 192, 193,194 and 195, provide: "It shall be the duty of the executor or administrator, if the lands and tenements ordered to be sold as aforesaid, do not sell for two thirds of the appraised value thereof, to reserve the same from sale."

It appears by the order of Court that this appraisal was made at $1.50 an acre, on a baisis of 808.42 acres, which would aggregate $1212.63, and the bid of the said W. A. Rust for this land is shown as two thirds thereof, or $808.42, which amount he paid on the basis of $1.50 an acre.

Thus it is perceived why the Plaintiff in Error was willing to rest upon an agreement as to title that did not cover **accretions**. In the first place, "all of Horseshoe Island" was owned by Stringer, and its area was shown as 808.42 acres, **including accretions**, in 1894, when there was no controversy over it, and having obtained title to 808.42 acres, including accretions, under an appraisement

at $1.50 an acre, and having had the sale confirmed, it comes with an ill grace from Plaintiff in Error to claim that it obtained under this deed for 808.42 acres, something in excess of 4,000 acres, and which, at the paltry sum of $1.50 an acre, would have been a fraud upon the estate to the extent of many thousands of dollars.

We, therefore, say that the proof on this proposition was not made by Plaintiff in Error, because it dare not go into the irregularities of that Administrator's sale, which was introduced as a part of the proceedings in Original No. 7, and which, on its own motion, is being heard with this case.

But it may be said that this Court cannot notice the recitals in Original No. 7. These two, however, are companion cases; and, if this did not suffice, this Court takes judicial knowledge of its own recrods (as per **Min. & Smelting Co. v. Billings**, 150 U. S. 31; **Bienville Water Supply Co. v. Mobile**, 186 U. S. 212; **Butler v. Eaton** 141 U. S. 240.) But even were this not so, it would furnish a satisfactory explanation of the absence of a Federal question from the record, viz., because it could not prove it had title to more than 808.42 acres.

> Counsel say (Brief 19): "It may be that this cause could have been tried without reference to the ownership of the land on which the timber was cut. It is obvious, however, that Defendants in Error could not safely rely merely on the contention that the timber was taken from their possession by force and intimidation, because it appears that the timber was claimed by Plaintiff in Error, while it lay on the ground where it was cut; that the defendant in error gave it up at a meeting with Plaintiff in Error's agent in the State of Mississippi, and thereupon entered in the employment of Plaintiff in Error for the purpose of removing the cut timber, and that this replevin suit was instituted a

couple of weeks later, after some of the timber had been floated in a raft to the Mississippi shore."

In this statement there are many errors:

(a) The replevin suit was instituted on January 22nd, 1913, (Tr. 2), and, as said by Zanders Parker (Tr. 14):

"Q. Well, how long was it before you brought this suit?

"A. Just as soon as Mr. De Sha come with the high sheriff of Phillips County, and demanded us not to bother the timber any more he would put us in jail, we went straight away.

"Q. How long was that before you brought this suit, how long after this conversation before the suit was brought?

"A. Before it was put in?

"Q. Yes?

"A. Right away next day.

Mr. DeSha (Tr. 47) shows this conversation to have been January 21st; the writ of replevin shows it was issued January 22nd.

The course pursued by Defendants in Error was based upon **Railroad v. Leblanc**, 74 Miss., 649.

(b) At page 36 it is again reiterated that Plaintiff in Error did not take possession of the timber physically on the ground, but went to these negroes, in Mississippi, with a petty Arkansas official, and attempted to terrorize those who had, in good faith, paid $3.50 a thousand for this timber, and in addition had worked on it for three weeks.

Take his own testimony:

"Q.What did they say, if anything, about releasing it or not releasing it?

"A. Why they said would release the timber.

"Q. What threat did you make against them, if any, if they didn't release it?

"A. Well, the deputy sheriff told them that if they ever went across there or did not release this timber, they were going to take hold of them and take care of them.

"Q. That was over in Mississippi that this conversation occurred, was it?

"A. Yes, sir. That was in Mississippi.

"Q. He told them that they might be taken and arrested if they went over there on that land anymore?

"A. He did. Told them he would take them down in Helena..... (Tr. 47).

"Q. What offer, or threat, of violence did you make towards these plaintiffs if they moved that timber.

"A. Well, that was all that was said, that if they ever crossed over or taken that timber, or molested that timber in any way, that they were going to be put in jail, taken care of.

"Q. And who said that? you or this deputy sheriff?

"A. The deputy sheriff.

"Q. What did you say yourself?

"A. I told them also that was my intention to do." (Tr. 47).

Turning back to the negroes' version of it, it will be seen that this Plaintiff in Error was represented by these white men who were guilty of acts of petty tyranny.

"Q. Well what did they say if you did not let them have it?

"A. Said if we did not let them have it, why, of course, they were going to put us in jail.

"Q. Did you turn it over to them willingly?

"A. No, sir, did not turn over to them willingly.

"A. What did you do immediately when they took charge of the timber?

"A. When they took charge of the timber, of course, he explained to me that this was the sheriff of Phillips County, Arkansas, by me being a negro man, I just give down, had to give down." (Tr. 20.)

All the other witnesses testified the same way, and to say, in the face of this testimony, that Defendant in Error, gave up this timber willingly, as Plaintiff in Error's witnesses do, is simply preposterous. It demonstrates that Plaintiff in Error was not willing to pursue the plain course pointed out by law, but was actuated by a desire to apply the rule of force.

On this conflict of evidence the jury found a verdict, and the Supreme Court affirmed the judgment.

(c) The instruction for the Defendants in Error was that Plaintiff in Error, by reason of the force and intimidation used, had to prove the legal title of the land to be in itself, in order to justify its wrongful act.

It is true that, in addition to this, there was evidence tending to show that this Pecan Lake was washed out in 1857, and furthermore, that there was adverse possession; and, furthermore, that the Defendants in Error were the owners; but, principally, the proposition turned upon the wrongful act of the Plaintiff in Error, in seizing, by intimidation, a possession whereto it had no right, and the burden thus cast, has not been met.

It furthermore appears that the land in question is a portion of lot One (1), as actually surveyed in 1835, and that the Mississippi River has now left that which was surveyed above ground, and thereby, under the doctrine of reliction, Defendants in Error were entitled thereto **Hughes v. Birney**, 32 So., 30; **Maw v. Brenau**, 156, N. W.,

792; **Marks v. Sambrano,** 170 S. W., 546; **Widdiecombe v. Rosemiller,** 118 Fed., 96; **Murphy v. Norton,** 61 How. Prac., 197;**Same case: 100 N. Y.** 424.

In re City of Buffalo, 99 N. E., 853, cited, does not conflict with this doctrine—this case being approved in **Arkansas v. Tennessee,** 246 U. S., 174.

In the Buffalo case, the lands that were submerged were hoplessly gone; and in the instant case, they have reappeared under natural causes and are located by actual survey. This being true,**St. Louis v. Roots,** 138 U. S., 247, applies:

> "It is well settled that the owner in fee of the bed of a river, or other submerged land, is the owner of any bar, island, or dry land which subsequently may be formed thereon." Approving **Mulry v. Norton,** 100 N. Y. 748.

There are other claims more at length set forth in the original brief and to which reference is made.

The principal contention of counsel, that the line between Mississippi and Arkansas is equisdistant from the visible banks is **not founded upon the instructions** in this cause. They expressly fixed the boundary line as the **middle of the main channel,** without defining it; and do contend, under the rulings of this Court, that, where the middle of the main channel cannot be located by proof, then that this Court will assume it to be equidistant between the fixed banks in a normal stage of water, even if it were a federal question.

Our position is directly supported by **Iowa v. Illinois,** 147 U. S., 8, where Mr. Creasy is quoted, with approval, thus: "It has been stated that, where a navigable river separates neighboring states, the thalweg, or middle of a navigable channel, forms the line of separation. Formerly, a line drawn along the middle of the

water, the **medium filum aquae** was regarded as the boundary line; and still will be regarded **prima facie** as boundary line, except as to those parts of the River, as to which can be proved that the vessels which navigate those parts keep their course habitually along some channel different from the **medium filum.** When this is the case, the middle of the channel of traffic is now construed to be the line of demarkation."

State v. Kean, 84 Missouri Appeals, 130.

Counsel is in error as to the **sole contention** being the boundary between Arkansas and Mississippi. Counsel for Defendant in Error have admitted that the decisions of this Court were conclusive upon all Federal questions and the instructions of the circuit court, both for defendant and for plaintiff are conformable to the decisions here, saving and excepting that those granted the Plaintiff in Error were more liberal than it was entitled to, as shown **supra.**

There was not any trial of the issue of the boundary line between the two states in the supreme court of Mississippi; that which was insisted upon there, as conclusive, among others was, (a) that Plaintiff in Error did not own below the high water mark; (b) that the State of Arkansas reserved the channel of all streams for public purposes; (c) that the burden of proof imposed by the wrongful taking was not met.

The instructions, quoted by the Plaintiff in Error: (Bf. 23) "That the boundary line between the States was the 'thread of the stream or channel of the Mississippi River at the time of the cut off in 1848', or 'a channel of the Mississippi River where the cut off in 1848 occurred,' is not correctly quoted, (Tr. 160,); and the definition given by the Court by its instructions of such channel was not, as counsel contends, 'a line equally distant from both banks;' but, the Court expressly told the jury that, (Tr. 161):

"The Court instructs the jury for the defendant, that if they believe from the evidence that the body of water shown on the maps introduced in evidence in this case .....was the last channel of the river as it dried up..... then the jury should find for the defendant." This same principle is enunciated throughout the instructions of the Court.

This contention in the circuit court would have been perfectly proper, however, under the facts in this case. Plaintiff in Error did not introduce a single witness who could swear and did swear, as a fact, that, at the date of the avulsion, the middle of the main channel of commerce was coincident with the thread of Old River. Until that was done, the presumption of the channel being equidistant from the banks controlled. Authorities **supra.**

A sufficient reason for refusing the instruction quoted in part, by counsel, was that it was violative of Section 793, Code of 1906, under which the Judge, in any cause, is prohibited from summing up, or commenting on the testimony, or charging the jury as to the weight of the evidence; and singling out parts of the testimony is condemned under the State practice under this statute.

French v. **Sale**, 63 Miss., 386;

And, in Mississippi, under this statute, the court cannot originate instructions, and can only give those that are asked, and, if Plaintiff in Error desired fuller instructions, his recourse was to have asked them.

It is furthermore contended that the instructions for Plaintiff in Error awarded it this land, if it was in the State of Arkansas, and that, therefore, this was conclusive; but, under the Mississippi practice, the supreme court is required to render a judgment in accordance with the very right of the cause, and, in the instant case, the instructions which were given upon this aspect, for Plain-

tiff in Error, were broader than Plaintiff in Error was entitled to, and more than it had the right to ask, as hereinbefore shown; and the point that these instructions were designed to produce was pressed home in the Mississippi Supreme Court, with the effect that this case was affirmed without any opinion, which would not have been the case had it decided any fundamental proposition, or any important principle of law. Section 4918, Code 1906; **Y. & M. V. R. R. Co.** v. **James,** 108 Miss. 852, **supra.**

Counsel well says, that in the petition for a reargument it is said:

> "There are now pending between this appellant and various other persons, in addition to this cause, two other suits involving timber cut from land situated in what was Horshoe Bend..... whether the decision of the court in this case is decisive, or affects either of these cases depends upon what this Court decides in this case.....To fail to state to appellant the reason why it has been turned away.....it seems, inconsistent with the principle that public policy demands an end of litigation." (Tr. 172.)

It thus appears, that counsel in this suggestion of error did not conceive that there had necessarily been any such decision made as its counsel, who now represent Plaintiff in Error in this court, contends.

If any such "important principle" as that boundary of sovereign States had been decided, and the attention of the court was shaprly called to it as involving a Federal question, and with a view to admit of error to the court, (Tr. 171), the Supreme Court of Mississippi would have granted the request for an opinion in writing conformably to Section 4918, Code 1906.

This shows that the Supreme Court of Mississippi did not pass upon a Federal question in affirming this

judgment; and, also, for the reasons, hereinbefore set forth.

Counsel claim that no other question than that of boundary was involved, but, therein, as hereinbefore shown, Counsel is in error, and any instruction of the Court which gave this land to the Plaintiff in Error, simply by reason of its being in Arkansas, was and is, erroneous, for the reasons hereinbefore set forth.

The instructions of the circuit court are in harmony with the decisions of this court; and they are more favorable to Plaintiff in Error than it was entitled to have.

At Bf. p. 23, Counsel claims that Defendants in Error conceded in their supplemental brief that the instructions are not in accordance with the decisions of this court, and this is not true; but this meant that said instructions are more favorable to Plaintiff in Error than this Court has ever authorized; and being more favorable to Plaintiff in Error, the Plaintiff in Error cannot complain.

The Supreme Court of Mississippi did not err in refusing to reverse the judgment on the ground that a verdict should have been directed for Plaintiff in Error. This is manifestly true, because among other things,

(a) What are boundaries is a matter of law for the court; where they are is a matter of fact for the jury. **Barclay v. Howell's Lessee**, 6 Pet. 498; 9 C. J. 289.

(b) Plaintiff in Error did not have title below the high water mark in Arkansas.

(c) There was a conflict in the evidence as to the taking by force and intimidation.

(d) Plaintiff in Error did not prove itself to be the

owner of the land; on the contrary the evidence shows that it was not such owner; that it did not even pay taxes on the land; and, as now appears in the companion case, that it did not buy it at all.

(e) It is not entitled to accretions after an avulsion.

(f) There was testimony as to the formation of old River which had to be submitted to the jury.

(g) As between Plaintiff in Error and Defendants in Error, there is not now and never has been, a controversy as to the boundary line, because their rights have never been brought in conflict at any point—being always separated under the uniform decisions of Arkansas by at least one half of the Mississippi River.

THIS CAUSE IS REVIEWABLE BY CERTIORARI ONLY, IF REVIEWABLE AT ALL, BECAUSE THERE WAS NOT DRAWN IN QUESTION THE VALIDITY OF ANY STATUTE, TREATY OR AUTHORITY EXERCISED UNDER THE UNITED STATES.

Opposing counsel contend that this cause, assuming the Federal questions had been passed upon, could be reviewed under a writ of error, and that the exclusive method was not a writ of certiorari.

The Plaintiff in Error, since filing its brief, has made a motion in this court for a certiorari, and this, in effect, is a confession that a writ of error cannot be maintained. Primarily, opposite counsel cannot point out in the instructions any conflict detrimental to Plaintiff in Error between the rule announced in them and the decision of this Court in **Arkansas** v. **Tennessee, supra,** and **Cissna** v. **Tennessee, supra.** The instructions, as such, do not call in question the validity of any authority exercised under the United States, or the validity of any treaty or statute. The most that can be said, admitting the exist-

ence for the sake of the argument of the Federal questions, that there was a question of fact submitted to the jury, under concededly valid treaties. The distinction is between an attack upon the validity of the treaty, and, at most, a question of fact with reference to its construction.

As hereinbefore pointed out, certain instructions were granted Plaintiff in Error to which under the rulings of this court, it was not entitled, and there is no controversy in this record as to the validity of the treaties, of any authority exercised under the United States.

The most that can be said is that there was a construction of said treaties as to said territory involved, and, in cases of this character, jurisdiction must be obtained by **certorari**. **Erie Railroad Co.** v. **Hamilton**, No. 112, decided January 7th, 1919, holds:

> "Since, as we have seen, the Plaintiff in Error has not assailed the validity of the Russian treaty, but, on the contrary, has claimed under an asserted construction of it, which was denied, it is clear that the case cannot come into this court by writ of error, under the statute quoted. At most the Railroad Company asserted a right under the treaty which was denied to it by the state courts, and this, under the plain reading of the statute, could give it a right to review here only by writ of certorari.
>
> "The distinction between the assailing the validity of a treaty or of a statute, and relying upon a special construction of either is patent and has been the subject of such full discussion by this court that it should not now be considered doubtful or obscure. **Baltimore & P. R. Co.** v. **Hopkins**, 130 U. S. 210, 32 L. Ed. 908, 9 Sup. Ct. Rep. 503; **District of Columbia** v. **Gannon**, 130 U. S. 227, 32 L. Ed 922, 9 Sup. Ct. Rep. 508; **Louisville & N. R. Co.**

v. **Louisville**, 166 U. S. 709, 715, 41 L. Ed. 1173, 1175, 17 Sup. Ct. Rep. 725; **United States** v. **Lynch**, 137 U. S. 280, 285, 34 L. Ed. 700, 702, 11 Sup. Ct. Rep. 114; **South Carolina** v. **Seymour**, 153 U. S. 353, 358, 38 L. Ed. 742, 744, 14 Sup. Ct. Rep. 871; **United States ex rel Taylor** v. **Taft**, 203 U. S. 461, 464, 51 L. Ed. 269, 274, 27 Sup. Ct. Rep. 148; **Stadelman** v. **Miner**, 246 U. S. 544, 62 L. Ed. 875, 38 Sup. Ct. Rep. 359."

See also **Kennard** v. **Nebraska**, 186 U. S. 304; **Central Vermont R. Co. v. White** 238, U. S. 507; **Development Co. v. Philippines**, 247 U. S., 389; **Ramos v. Tobacos**, 241 U. S. 461; **Gsell v. Collector**, 239 U. S., 93; **Rama** v. **Rama**, 241 U. S., 160.

The distinction made is conclusive of the proposition involved. The validity of the treaty or of the authority must be denied. This was not done. It was conceded and is conceded throughout, as will appear from the entire proceedings in this cause.

But as shown, these treaties were wholly without effect in this case. Nothing more was decided than an interpretation of the several constitutions.

This contention was not submitted to the State Supreme Court, and it is urged here for the first time—in the State court the validity of the treaties was conceded, and is conceded here.

Ireland v. Woods, 246 U. S., 328 says:

"Coming then to consider what was involved in the decision of the courts below, it is manifest that the validity of no national enactment or authority was drawn in question, nor, in the meaning of the section, the validity of a statute or authority of the State.

"There is no doubt of the right of the Governor of New Jersey to have demanded of the Governor of the State of New York, the extradition of Ireland, or of the Governor of the latter State to have complied. Indeed, it was the duty of both so to act, if the case justified it, and whether there was such justification was the only inquiry and decision of the court below," and then declares that which is conclusive here: "**A dispute of the facts upon which the authority was exercised is not a a dispute of its validity.**" (Italics ours.)

The distinction between the construction of an act—and in this case a construction more favorable than that vouchsafed by this court was given—and the denial of the validity thereof is a criterion whereby it is to be determined whether certiorari or writ of error is to be pursued. **Coon** v. **Kennedy** No. 398 Oct. Term, 1918, decided January 13, 1919.

As was said in **Baltimore &c R. R.** v. **Hopkins**, 130 U. S., 226; "The validity of the statutes and the validity of authority exercised under them, are, in substance, one and the same thing; and the validity of a statute, as these words are used in the Acts of Congress, refers to the power of Congress to pass the particular statute at all, and not to the mere judicial construction as contradistinguished from a denial of legislative power."

So, here, there was never a denial of the power; or of the validity of any of the treaties, or of the authority of the United States, but it is now and has been conceded throughout this litigation, that, they are binding upon all parties in accordance with the decisions of this Court.

See, also, **Sund** v. **United States**, 118 U. S. 363; **District of Columbia** v. **Gannon**, 130 U. S. 227; **Railroad Co.** v. **Louisville**, 166 U. S., 1175; **United States ex rel**, v. **Seymour**, 153 U. S. 353; **United States** v. **Taft**, 203 U. S. 461.

But it is said that this writ of error was granted by a Justice of this court, and therefore, that it is effectual, whereas, had it been granted by the Chief Justice of the Court **a quo**, it would have been ineffectual. We fail to perceive any distinction made between one writ and the other.

In the case of a certiorari, the matter would have had to be judicially considered, and Defendants in Error would have had an opportunity to be heard. The enforcement of this distinction in the many cases recently dismissed by this court should answer this contention.

Ireland v. **Woods**, 246 U. S., 328, points out the distinction thus:

> "The difference between the remedies is that one (writ of error) is allowed as of right, where, upon examination, it appears that the case is of the class designated in the statute, and that the Federal question presented is real and substantial, and an open one in this Court, while the other (certiorari) is granted or refused in the exercise of the court's discretion."

It cannot be contended that the granting of a writ of error is tantamount to a judicial determination by this court of a right to a review by certiorari.

This point was passed upon in **Cisna** v. **Tennessee**, 246 U. S., 293, where the Court declared:

> "This objection was overruled. A final judgment or decree went against him for upwards of $110,000, and the case was brought here by writ of error under Section 237, Judicial Code, before the amendment of September 6, 1916."

There was no necessity of so declaring, except to ex-

clude the conclusion that, after date, a writ of error was not the proper means of transferring the cause.

Section 1005, R. S. does not apply. The writ of error must be dismissed.. **Mason v. United States** 136 U. S., 581; **Estes** v. **Trabue** 128 U. S. 230; **Hardee** v. **Wilson, 146** U. S. 181.

II. (B)

Surety Companies were neccessary parties.

In **Tardy** v. **Rosenstock,** 80 So., 1, (Miss.) the Court said:

> "No summons has been issued herein for Farries. Consequently, appellant is not entitled, under the statute, to proceed with the appeal; but we do not think the judgment of the court below should be affirmed for that reason. The proper procedure, when the statute referred to has not been observed, is either to dismiss the appeal or require the statute to be complied with before the cause is taken up for consideration by the court."

And the Mississippi Supreme Court could have dismissed this appeal for that reason.

This decision was made upon December 2nd, 1918, and it construes the statute upon which Plaintiff in Error relied, and shows conclusively that the rule in Mississippi is the same as in this Court. If Plaintiff in Error desires to have this judgment of the circuit court reversed as to the United States Fidelity & Guaranty Company, it was essential that said Company be brought before said Supreme Court.

The contention that the Surety Company on the appeal bond to the State Supreme Court is not the same person as was surety thereon is preposterous. There is a judgment in the Supreme Court of Mississippi which is

sought to be reviewed here against the party named, and such party to said judgment in the state is expressly described as "Surety in the supersedeas bond," (Tr. 171) and if Plaintiff in Error desires to reverse that judgment in this court, every person who was a party to that judgment must be brought before this Court.

Error cannot be presumed when the bond is shown and a judgment is recited to have been rendered on it by the Court in which it was filed.

III.

THE BOUNDARY BETWEEN ARKANSAS AND MISSISSIPPI WAS NOT DETERMINED BY THE STATE SUPREME COURT; BUT IF SO, SUCH DETERMINATION WAS STRICTLY IN ACCORDANCE WITH THE LAW.

As we have endeavored to show **supra**, there was and never could be a controversy between Plaintiff in Error and the Defendants in Error which involved directly or indirectly the boundary line between Mississippi and Arkansas. It is true that in the submission of this cause to the jury there were certain instructions given which seemed to involve the boundary; but when the cause reached the State Supreme Court, the appellee, Defendants in Error, were not content to let the matter be presented to that Court in the light wherein it was tried below, but challenged, at the very outset, the title of the Plaintiff in Error, and had its challenge sustained; not on any ground that there was a question as to the validity of the treaties or authorities, but solely because there never was and never will be a common boundary line between the Plaintiff in Error and the Defendants in Error. This is covered fully under Point I above and will not be reiterated. Any question on that score, as we said in the State Supreme Court, will be between the State of Arkansas and the defendants in Error.

IV.

THE SUPREME COURT OF MISSISSIPPI DID NOT ERR IN SETTING ASIDE A CONTINUANCE GRANTED WITHOUT CONFORMITY TO ITS RULES; IN THIS, THAT THERE WAS NO NOTICE SERVED.

Rule 16 of the Supreme Court, provides:

> "Every Saturday shall be motion day; if counsel be not present and have no briefs filed when their motions are regularly called, such motions shall be dismissed. No motion will be considered until the opposite party shall have at least three full days notice, by mailing, or delivery to such party of the same."

The principal reason for setting aside the continuance was that no notice of it had been served as required by the rule, and when this appeared, the cause was set upon the docket for hearing in its regular order. The action of the Court with reference to granting a continuance never presents a Federal question when presented to an appellate court, whose sole function is to decide whether or not a judgement rendered by the Circuit Court of Coahoma County was correct. **Boone** v. **McJunkin** 63 Miss., 561; **Burt** v. **Caulk**, October term, 1918, without opinion. The Supreme Court considered the case in due order upon its merits, and that this would have conformed to all decisions of this Court upon Federal questions is not controverted by the counsel who appeared there for Plaintiff in Error. That which was decided by the Court, not its determination to hear the case, must present the Federal question. **Franklin** v. **South Carolina**, 218 U. S. 168; **Davis** v. **Texas**, 139 U. S. 651.

Furthermore, this was in no sense a final judgment, it was merely preliminary to the determination of the case upon its merits and when it was set aside, the Plaintiff in

Error, without any protest, proceeded to the hearing upon the merits. Unless the judgment had been final, there could have been no jurisdiction to review it. Judicial Code, 237. **Missouri v. Olathe**, 222 U. S. 185. This mere order to restore the cause to the docket for hearing did not make any final judgment which would be subject to review; it merely placed the cause upon the calendar for hearing. As was said in the Olathe case—"As it does not appear from the record that the judgment sought to be reviewed was one which finally determined the cause this court is without jurisdiction."

Wherefore we respectfully submit that this writ of error must be dismissed; but that, if jurisdiction is taken, then that there must be an affirmance of the judgment.

Respectfully,

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